TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 514

BYRON THORNHILL, PETITIONER,

vs.

THE STATE OF ALABAMA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED NOVEMBER 9, 1939.

CERTIORARI GRANTED DECEMBER 11, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

BYRON THORNHILL, PETITIONER,

vs.

THE STATE OF ALABAMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

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[fol. 1] [File endorsement omitted]

IN CIRCUIT COURT OF TUSCALOOSA COUNTY

No. 4243

THE STATE OF ALABAMA

vs.

BYRON THORNHILL

CERTIFICATE OF APPEAL

I, I. N. Hobson, Clerk of the Circuit Court of Tuscaloosa County in and for said County and State, do hereby certify that in the above stated case, which was tried and determined in this Court on the 20th day of December, 1937, and the defendant convicted of the offence of Loitering or Picketing, and that on the 20th day of December, 1937, said defendant was sentenced to a term of hard labor for County for fine and costs which said sentence was suspended pending an appeal to the Court of Appeals of Alabama.

I further certify that on this the — day of ——, 193–, the defendant gave notice in writing of an appeal to the —— Court of Alabama.

Witness my hand and the seal of this Court, this the 20th day of April, 1938.

I. N. Hobson, Clerk of the Circuit Court of Tuscaloosa County, Alabama. (Seal.)

[fol. 2] Order of continuance omitted in printing.

[fol. 3] Organization of court omitted in printing.

IN INFERIOR COURT OF TUSCALOOSA COUNTY

AFFIDAVIT AND WARRANT OF ARREST—Filed Dec. 20, 1937

Personally appeared before me, the undersigned authority in and for said County, J. M. Waldon who, being duly sworn, says on oath that there is probable cause for believing, that affiant does believe that Byron Thornhill whose

name is otherwise unknown to affiant within twelve months before making this affidavit, in said County:

1. Did without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of the Brown Wood Preserving Company, a Corporation, engaged in a lawful business, for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by the Brown Wood Preserving Company, a corporation, for the purpose of hindering, delaying or interfering with, or injuring the lawful business or enterprise of the Brown Wood Preserving Company, a corporation.

2. Did without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of the Brown Wood Preserving Company, a corporation, engaged in a lawful business, for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed — the Brown Wood Preserving Company, a corporation.

3. Did picket the works or place of business of the Brown Wood Preserving Company, a corporation for the purpose of hindering, delaying, or interfering with or injuring the lawful business or interprise of the Brown Wood Preserving Company, a corporation, against the peace and dignity of the State of Alabama.

J. M. Waldon.

Subscribed and sworn to before me this 20th day of December, 1937. W. E. Lathram, Justice of the Peace.

THE STATE OF ALABAMA,
Tuscaloosa County:

To Any Lawful Officer of Said County, Greetings:

[fol. 4] You Are Hereby Commanded to Arrest Byron Thornhill and bring him before the Inferior Court of Tuscaloosa County, at the present term, of said Court, to answer the State of Alabama, on the charge of Loitering and Picketing, preferred by J. Milton Waldon.

Witness my hand, this 20th day of December, 1937.

W. E. Lathram, Justice of the Peace.

Witness- for the State: Milton Walden, L. T. Simpson, Brownville.

Warrant of Arrest:

The officer arresting may admit the Defendant to bail upon his entering into bond in the sum of Two Hundred Dollars, with two good securities approved by said officer.

W. E. Lathram, Justice of the Peace.

Approved this 20 day of Decbr. 1987.

James A. McCollum, Solicitor.

Received in office this 20 day of December, 193–.

F. M. Shamblin, Sheriff.

Executed by arresting the within named Defendant Byron Thornhill and the said Defendant was committed to Bail in the amount of $200, this 20 day of December, 1937.

F. M. Shamblin, Sheriff, by J. M. Waldon, Deputy Sheriff.

[File endorsement omitted.]

[fol. 5] Appearance bond for $200.00; approved and filed Dec. 20, 1937, omitted in printing.

[fol. 6] In Inferior Court of Tuscaloosa County

State of Alabama

vs.

Byron Thornhill

Demurrer to Affidavit and Warrant—Filed December 20, 1937

Comes the defendant in the above styled cause and demurs to the complaint and affidavit and warrant filed against him and to each section thereof both separately and severally, and as grounds for said demurrer sets down and assigns the following separate and several counts, to-wit:

1. That said complaint does not state an offense cognizable by the law of Alabama.

2. That the statute which the defendant is charged with violating is repugnant to the Constitution of the United States.

3. That the statute which the defendant is charged in said complaint with violating is repugnant to the laws of the United States.

4. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the State of Alabama.

5. That the statute which the defendant is charged with violating in said complaint is repugnant to the Fourteenth Amendment of the Constitution of the United States.

6. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it refuses him the right to peaceful assemblage as guaranteed by the Constitution of the United States.

7. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it contravenes the defendant's right of freedom of speech.

8. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it denies the defendant the right to petition for redress.

9. That the statute which the defendant is charged with violating in said complaint is violative of the National Labor Relations Act.

10. That said complaint does not state an offense against the laws of the State of Alabama.

Respectfully submitted.

[fol. 7] Mayfield & Mayfield, by James J. Mayfield,
Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 8] IN INFERIOR COURT OF TUSCALOOSA COUNTY

[Title omitted]

JUDGMENT ENTRY—Filed Dec. 20, 1937

Dec. 20, 1937, the Defendant being duly arraigned, pleads nolo contendere to Picketing and Loitering, issue being joined on said plea; and after hearing the evidence in this case, the Court is satisfied of the guilt of the Defendant and hereby awards the following punishment: A Fine of $100.00 as punishment and the cost of this proceedings.

H. L. Findley, Judge.

Dec. 20, 1937, the Defendant having failed to pay said Fine and Costs or to secure the same; it is hereby ordered by the Court that he be and hereby is sentenced to perform hard labor for the State of Alabama for the use of Tuscaloosa County a period of 30 Days to pay said Fine, and an additional period of 29 Days @ 75¢ per Day to pay the Costs of this proceedings.

H. L. Findley, Judge.

The Defendant prays an Appeal from the Judgment of this Court to the Present Term of the Circuit Court, which is hereby granted, and his Bond fixed at $300.00.

Clerk's certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

[fol. 9] IN CIRCUIT COURT OF TUSCALOOSA COUNTY

[Title omitted]

COMPLAINT—Filed Dec. 20, 1937

1. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did without just cause or legal excuse therefor, go near to or loiter about the premises or place of business of another person, firm, corpora-

tion or association of people, to-wit; the Brown Wood Preserving Company, Inc., a corporation, engaged in a lawful business, for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by the said Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation.

2. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of another person, firm, corporation or association of people, to-wit: the Brown Wood Preserving, Inc., a corporation, engaged in a lawful business, for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by the said Brown Wood Preserving Company, Inc., a corporation.

3. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did picket the works or place of business of another person, firm, corporation or association of people, to-wit, the Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying, or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation.

Gordon Davis, Solicitor 6th Judicial Circuit of Alabama.

[File endorsement omitted.]

[fol. 10] In Circuit Court of Tuscaloosa County

[Title omitted]

Demurrer to Complaint—Filed Dec. 20, 1937

Comes the defendant in the above styled cause and demurs to the complaint filed against him and to each section thereof both separately and severally, and as grounds for said

demurrer sets down and assigns the following separate and several reasons, to-wit:

1. That said complaint does not state an offense cognizable by the law of Alabama.

2. That the statute which the defendant is charged with violating is repugnant to the Constitution of the United States.

3. That the statute which the defendant is charged in said complaint with violating is repugnant to the laws of the United States.

4. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the State of Alabama.

5. That the statute which the defendant is charged with violating in said complaint is repugnant to the Fourteenth Amendment of the Constitution of the United States.

6. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it refuses him the right of peaceful assemblage as guaranteed by the Constitution of the United States.

7. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it contravenes the defendant's right of freedom of speech.

8. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it denies the defendant the right to petition for redress.

9. That the statute which the defendant is charged with violating in said complaint is violative of the National Labor Relations Act.

10. That said complaint does not state an offense against the laws of the State of Alabama.

Respectfully submitted, Mayfield & Mayfield, by James J. Mayfield, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 11] In Circuit Court of Tuscaloosa County

[Title omitted]

Judgment Entry—December 20, 1937

This case coming on to be heard on this day in this court on appeal from the Inferior Court of Tuscaloosa County, Alabama, comes Gordon Davis, Solicitor who prosecutes for the State, and comes also the defendant in his own proper person and by attorney. The State by its Solicitor files its complaint herein in which it charges the defendant with the offense of Loitering and Picketing. The defendant then being duly arraigned in open court upon the complaint herein charging him with Loitering and Picketing for a plea thereto says he is not guilty. No jury having been demanded or asked for the court proceeds to try this case without a jury. After hearing all of the evidence introduced herein and after considering the same the court is of the opinion that the defendant, Byron Thornhill, is guilty of Loitering and Picketing as charged in the complaint. It is, therefore, considered by the court and it is the order and judgment of the court that the defendant, Byron Thornhill, is guilty of Loitering, and Picketing as charged in the complaint and that he pay a fine of $100.00 together with the costs in this case. And now on this the 20 day of December, 1937, the fine and costs in this case not being presently paid nor judgment confessed therefor as required by law the defendant being present in open court and having been present in his own proper person during the entire time of the trial of this case being asked by the court if he has anything to say why the sentence of the law should not now be pronounced upon him says nothing. It is, therefore, considered by the court and it is the order, judgment, and sentence of the court that the defendant, Byron Thornhill, do and perform hard labor for the County of Tuscaloosa for 30 days to pay said fine of $100.00 and for 43 days additional at the rate of 75¢ per day to pay the costs in this case. The defendant having made known to the Court his desire to prosecute an appeal from the judgment and sentence of this court to the Court of Appeals of Alabama; it is, therefore, considered by the court and it is the order and judgment of the court that the execution of this sentence be suspended pending said appeal and the court fixes the amount of the defendant's appeal bond at $100.00.

[fol. 12] Bond on Appeal for $1000.00 approved and filed Dec. 20, 1937, omitted in printing.

[fol. 13] In Circuit Court of Tuscaloosa County

Bill of Exceptions—Filed March 5, 1938

Be it remembered, That on the trial of the above entitled cause in the Circuit Court of Tuscaloosa County, Alabama, on to-wit December 20, 1937, before the Honorable Henry B. Foster, Judge Presiding, the following proceedings not otherwise appearing of record, were had and done.

Clarence Simpson, a witness for the State, being first duly sworn, testified on direct examination as follows:

My name is Clarence Simpson; I know Byron Thornhill the defendant, and I know J. M. Walden, who swore out the warrant in this case. I was formerly employed by Brown Wood Preserving Company, Inc. a corporation which operates a creosoting plant at Brownville, Alabama, in Tuscaloosa County. On November 24, 1937, a strike was called at the plant of Brown Wood Preserving Company, and the plant has not operated since that time. The Brown Wood Preserving Company operates a railroad track in the yard of its plant. I was employed there at the yard. Sometime after the strike was called, a notice was posted on the premises of the Brown Wood Preserving Company notifying employees that the plant would resume operations. I do not recall when the notice was posted. On the date indicated in the notice I reported at the plant to go to work, and when I reached the plant, I saw Byron Thornhill on the picket line at the plant. A picket line has been maintained around the plant since the time the strike was called, with two picket posts on said line and about six or eight men on each picket post. Three shifts of men stay on the posts in each twenty-four hours. The said picket posts are on the property of Brown Wood Preserving Company, on a private entrance for employees, and not on any public road. I was employed by Brown Wood Preserving Company at the time the strike was called, and I did not work during the duration of the strike; I do not recall the date the notice to resume operations was posted, but in my judgment it was about three weeks after the strike

was called. I do not know whether or not the Company attempted to operate the plant on the morning that I reported for duty, the morning indicated in the notice.

On the morning indicated in the notice that the plant would resume operations, I started to work and had to go by the picket lines. When I reached the picket line, Mr. Thornhill came out and told me they were on a strike and did not want anybody to go up there to work. I then turned and went back to the house, and did not go to work. When Mr. Thornhill said he did not want anybody to go "up there", he was referring to the plant of the Brown Wood Preserving Company. The plant did not begin operations [fol. 14] on the day it was scheduled to begin. When I saw and talked to Mr. Thornhill, he was near the picket line on the property of Brown Wood Preserving Company, in company with six or eight other men. None of the other men said anything to me. I did not see Mr. Thornhill on the picket line at any time except the morning which I have just testified to. I was not a member of the Union. Mr. Thornhill did not tell me that he was connected with the Union in any way; and I do not know that he was President of the Union at the Creosoting Plant. I do not know whether or not Mr. J. M. Walden was present at the picket line that morning. The two pickets posts I have referred to were on approaches that led up to the plant of Brown Wood Preserving Company, and the employees went to the plant on these approaches, which were not on any public road. The occurrence I have testified to took place in Tuscaloosa County, Alabama, within twelve months before the warrant in this case was sworn out.

On cross-examination the witness testified as follows:

Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceable manner, and did not put me in fear; he did not appear to be mad. Brown Wood Preserving Company has railroad tracks leading into the plant. I am familiar with their business in a general way; they get poles which they process at the plant from all around the plant, and ship them from the plant to different places, but I do not know that they ship a great many outside the State of Alabama.

J. M. WALDEN, a witness for the State, being first duly sworn, testified as follows:

This is J. M. Walden. I am Deputy Sheriff of Tuscaloosa County; I know Byron Thornhill, the defendant in this case; I also know Clarence Simpson. I am a member of the Union at Brownville, and the only name I know of the Union is American Federation of Labor. We have only one union there, and that is the only name I know for it. Mr. Thornhill and I belong to the same Union, and we were formerly employed by Brown Wood Preserving Company. On or about November 24, 1937, the day before Thanksgiving, a strike was called at the plant of Brown Wood Preserving Company at Brownville, Alabama. Subsequent to the time the strike was called picket lines were established at said plant, and two picket posts were established, on the road or pathway leading up to the plant, not on the only path, but on the usual path up to the plant, which was not a public highway.. Clarence Simpson was formerly employed at the plant of Brown Wood Preserving Company. Two or three weeks after the strike was called at the plant, [fol. 15] Brown Wood Preserving Company posted notices at the plant that work would be resumed at the plant. I do not recall the exact date the notices were posted. During the strike the pickets had been on the picket lines twenty-four hours a day, working in three shifts of eight hours each. At each picket post there were six or eight men. I say Mr. Byron Thornhill on the picket line on the day the plant was scheduled to resume operations, when he was talking to Clarence Simpson. I heard him say to Clarence Simpson that they were on strike and he would ask him (Simpson) not to go down there to work until some settlement was made of the strike. I did not see Mr. Thornhill talk to anyone else. The plant did not resume operations that day. A fire was put in the crane, and some one took the fire out of the crane. The fire was put into the crane after the conversation which I heard between Mr. Thornhill and Clarence Simpson. Some of the pickets took the fire out of the crane, but I do not know whether or not Byron Thornhill had anything to do with taking out the fire. Byron Thornhill is President of the Union at Brownville. I am a member of the Union. I was present in a meeting in Inferior Court Room in Tuscaloosa, about a week ago and heard what was said by Mr. Thornhill and others in the

conference and heard the agreement that was made. I understood that the meeting was an attempt to conciliate the strike; and that Mr. Thornhill had that intention, and it was also my intention. There were some efforts at adjustment of the strike. Mr. Thornhill was an employee of the Company before the strike; if I understood it, they made assurance that there would be no work going on there, they would not try to go to work, if I understood it right. I have not been present in any meetings of the Local at Brownville when Mr. Thornhill was present since the strike was called, nor immediately preceding the calling of the strike; the meetings which I attended where he was present were held some two or three weeks before the strike was called, and the strike was not discussed at that time, nor the question of picketing the plant. Brown Wood Preserving Company employed about 100 men, and I believe there were 96 of them members of the Union.

On the morning about which I have testified I did not see anyone at work, but saw Clarence Simpson going to work, and I saw some men at the crane. After we came back to the plant we could not see the crane from where we were. The railroad track was close to the picket post.

On cross-examination, the witness J. M. Walden testified as follows:

I know where Clarence Simpson lives, he lives on prop-[fol. 16] erty of Brown Wood Preserving Company; and also does some trading on Company property. The Union meets on property of Brown Wood Preserving Company; the Company has not made demand on the men, since the strike was called, not to come on the Company property. The employees get their mail from a U. S. Post-office located on Company property. I do not know of any notice posted or word circulated that the men were not to come on Company property. Practically all the men who work in the Plant of Brown Wood Preserving Company live on Company property. I do not know whether or not Brown Wood Preserving Company ships poles out of the State of Alabama. At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man. The picket posts which I have referred to were tents in which the men stayed to keep warm in cold weather.

On re-direct Examination, the witness J. M. Walden testified as follows:

The tents which were put up on the picket lines were put there after the strike was called, for the pickets to stay in out of the weather. I had been employed by Brown Wood Preserving Company prior to the strike, but no one was working at the time I have testified to, except the officials. On the day which I have testified to, there was a notice posted notifying the employees to come back to work. I suppose Mr. Thornhill was invited back to work; he had been laid off for sometime before the strike was called. The notice invited those men back to work who quit when the strike was called, and did not invite back those who had been laid off prior to the strike. I cannot tell exactly what the notice contained. I read the notice; I do not know whether or not Mr. Thornhill read the notice; I did not hear him say whether or not he read it. I was laid off from work at a time when there was no one working but the boss man and me; I don't suppose I was laid off at the same time Mr. Thornhill was laid off. As I understood the notice which was posted, only those employees who were working at the time of the strike, were invited back to work.

The witness, Clarence Simpson, being recalled for further recross examination, testified as follows:

I did not read the notice which was posted by the Brown Wood Preserving Company; my boss man, Carl Johnson, told me the contents of the notice. Mr. Johnson is foreman of the department in which I work. He invited me back to work on the morning testified about.

DEFENDANT'S MOTION TO EXCLUDE EVIDENCE

The defendant then and there moved the Court to exclude [fol. 17] all the testimony taken at the trial and for grounds of said motion, assigned the following grounds:

1. That said testimony is insufficient to sustain a conviction.

2. That the statute under which the defendant is being prosecuted is violative of the Constitution of the State of Alabama, and of the Constitution of the United States.

The Court here asked counsel for defendant if he insisted upon his motion to exclude all the evidence and discharge

the defendant on account of the insufficiency of the evidence. Defendant's counsel stated that the only question he wanted to raise was the constitutionality of the Alabama anti-picketing statute, and claimed that said statute was violative of the Constitution of the United States and of the State of Alabama, and that was really the question that the Court undertook to determine. The defendant expressed a desire to test the constitutionality of the anti-picketing statute, and that could not be done by him, except upon a conviction.

The Court overruled the motion and defendant duly excepted.

The defendant did not offer any testimony.

This was all the evidence in the case.

ORDER SETTLING BILL OF EXCEPTIONS.

Wherefore, the defendant tenders this, his Bill of Exceptions, and prays that the same may be signed and sealed and made a part of the record in this cause, which is accordingly done in term time on this the 5th day of March, 1938.

Henry B. Foster, Judge Presiding.

The above and foregoing Bill of Exceptions was duly presented to me within the time allowed for presenting the same, on this the 5th day of March, 1938.

Henry B. Foster, Judge Presiding.

[File endorsement omitted.]

[fol. 18] Citation, in usual form; showing service on Gordon Davis, April 6, 1938, omitted in printing.

IN CIRCUIT COURT OF TUSCALOOSA COUNTY

CERTIFICATE OF APPEAL

I, I. N. Hobson, Clerk of the Tuscaloosa County Circuit Court, hereby certify that the foregoing pages, from 1 to 16 inclusive, contain a full and complete transcript of the record and proceedings of the said Tuscaloosa County Circuit Court in a cause therein pending, wherein The State of Alabama is Plaintiff and Byron Thornhill is Defendant;

that the said Byron Thornhill did, on the 20th day of December, 1937, obtain an appeal to the Present Term, 1938, of the Court of Appeals of Alabama, all of which I hereby certify to said Court of Appeals.

Witness my hand, this 19 day of August, 1938.

I. N. Hobson, Clerk. (Seal.)

[fol. 19] IN COURT OF APPEALS OF ALABAMA

Present: All the Judges.

Tuscaloosa Circuit Court

6 Div. 334

BYRON THORNHILL

vs.

THE STATE

ORDER OF SUBMISSION—December 1, 1938

Come the parties by attorneys, and submit this cause on briefs for decision.

[fol. 20] IN COURT OF APPEALS OF ALABAMA

Present: All the Judges.

Tuscaloosa Circuit Court

6 Div. 334

BYRON THORNHILL

vs.

THE STATE

JUDGMENT—January 17, 1939

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit

Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

D

[fol. 21] IN COURT OF APPEALS OF ALABAMA

October Term, 1938-39

6 Div. 334

BYRON THORNHILL

v.

STATE

Appealed from Tuscaloosa Circuit Court

OPINION

RICE, Judge:

Section 3448 of the Code of 1923 reads as follows:

"Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

Appellant was convicted of the offense denounced by the above Code section.

It seems clear enough that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he was being prosecuted, within the purview of the prohibition implied in said Statute.

So, as conceded by able counsel here representing appellant, "the only question involved in this appeal is the constitutionality *vel non* of Section 3448 of the Code of Alabama of 1923."

[fol. 22] And, as further conceded by the said counsel, this exact question has been heretofore decided both by this Court and the Supreme Court—this Court of course merely following the decision by the Supreme Court, as it was required to do (Code 1923 Sec. 7318)—adversely to the contentions here urged against the validity of said statute. See O'Rourke v. City of Birmingham 27 Ala. App. 133, 168 So. 206, Cert. denied Ib. 232 Ala. 355, 168 So. 209; and Hardie-Tynes Mfg. Co. v. Cruise et al. 189 Ala. 66, 66 So. 657.

It results, there is nothing for us to do but affirm the judgment of conviction. Code Sec. 7318, Supra.

Which we hereby do.

Affirmed.

[fol. 23] In Court of Appeals of Alabama

[Title omitted]

Application for Rehearing Filed Ex Mero Motu

Comes the appellant and moves the Court to set aside the judgment of the Court rendered on the 17th day of January, 1939, affirming the judgment of the lower court in said cause, and to grant to appellant a rehearing in said cause, and in support of said application for rehearing, attaches the following brief and argument thereto.

This 12th day of February, 1939.

James J. Mayfield, Attorney for the Appellant.

The undersigned, of counsel for appellant, certifies that a copy of the foregoing application for a rehearing and brief and argument in support thereof was this day personally mailed by the undersigned, postage prepaid, to Thomas S. Lawson, Attorney General of the State of Alabama at Montgomery, Alabama.

This 12th day of February, 1939.

James J. Mayfield, Attorney for the Appellant.

[fol. 24] IN COURT OF APPEALS OF ALABAMA

CERTIFICATE OF RECALL PENDING CONSIDERATION OF APPLICATION FOR REHEARING

To the Clerk of the Circuit Court of Tuscaloosa County, Greeting:

Whereas, in the matter of Byron Thornhill, Appellant, vs. The State of Alabama, Appellee, recently pending in the Court of Appeals of Alabama, on appeal from the said Circuit Court of Tuscaloosa County, our Court of Appeals did on the 17th day of January, 1939, render a Judgment of Affirmance in said cause; and,

Whereas, a certificate of such action of the Court of Appeals was duly issued to you, and thereafter an application for a rehearing of said cause was filed ex mero motu in this Court on the 11th day of February, 1939;

Now, it is hereby certified, that our Court of Appeals, or one of the Justices thereof, did, on the 11th day of February, 1939, order that the said certificate be recalled.

And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you.

Witness, Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama, at the Capitol, this the 11th day of February, 1939.

Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama.

[fol. 25] IN COURT OF APPEALS OF ALABAMA

Present: All the Judges.

[Title omitted]

ORDER OVERRULING APPLICATION FOR REHEARING—May 23, 1939

It is ordered that the application for rehearing filed by the Appellant ex mero motu in this cause on February 11th, 1939, after being duly examined and considered by the Court be and is overruled.

[fol. 26] IN COURT OF APPEALS OF ALABAMA

CERTIFICATE OF RECALL PENDING CONSIDERATION OF THE PETITION FOR CERTIORARI FILED IN THE SUPREME COURT OF ALABAMA

To the Clerk of the Circuit Court of Tuscaloosa County, Greeting:

Whereas, in the matter of Byron Thornhill, Appellant vs. The State of Alabama, Appellee recently pending in the Court of Appeals of Alabama, on appeal from the said Circuit Court of Tuscaloosa County, our Court of Appeals did on the 17th day of January, 1939, render a Judgment of Affirmance in said cause; and, thereafter an application for a rehearing of said cause filed ex mero motu in this Court on the 11th day of February, 1939, was overruled by this Court on the 23rd day of May, 1939.

Whereas, a certificate of such action of the Court of Appeals was duly issued to you, and thereafter a Petition for Certiorari to the Court of Appeals in said cause was filed in the Supreme Court on the 7th day of June, 1939.

Now, it is hereby certified, that our Court of Appeals did on the 9th day of June, 1939, order that the said certificate of affirmance be recalled, pending consideration of the Petition for Certiorari to the Court of Appeals filed in the Supreme Court June 7th, 1939. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you.

Witness, Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama, at the Capitol, this the 9th day of June, 1939.

Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama.

[fol. 27] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 28] IN SUPREME COURT OF ALABAMA

6 Div. 530

Ex parte: Byron Thornhill

PETITION FOR CERTIORARI TO THE COURT OF APPEALS

In re: BYRON THORNHILL

vs.

THE STATE OF ALABAMA

[fol. 29] IN THE COURT OF APPEALS AND APPEALED FROM TUSCALOOSA COUNTY CIRCUIT COURT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Your petitioner, Byron Thornhill, hereby respectfully petitions this Honorable Court to review and determine the decision rendered by the Court of Appeals in that certain appeal in said court numbered and styled 6th Div. 334, Byron Thornhill vs. The State of Alabama, handed down in said Court of Appeals on the 23rd day of May, 1939. And petitioner respectfully shows unto this Honorable Court as follows:

1. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama 1923, was not violative of the Constitution of Alabama, 1901.

2. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the Bill of Rights of the Constitution of Alabama, 1901.

3. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the citizen's right of freedom of speech, and to publish his sentiments on all subjects as guaranteed by Article 1, Section 4 of the Constitution of Alabama.

4. That the Court of Appeals erred in attempting to extend the purview of Section 3448 of the Code of Alabama, 1923, to the defendant and the facts at Bar.

5. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of

the Fourteenth Amendment of the Constitution of the United States.

[fol. 30] 6. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the Defendant's right of peaceful assembly as guaranteed by Article 1, Section 4 of the Constitution of Alabama, 1901.

7. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the due process clause of the Constitution of the United States.

8. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the Constitution of the United States.

Wherefore, your petitioner prays that a writ of certiorari, or such other appropriate and necessary writ, be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Alabama, commanding and requiring said court to certify and send to this Honorable Court, on a day certain, to be designated therein, a full and complete transcript of the record of all the proceedings of the Court of Appeals in said case, numbered and styled as aforesaid to the end that said case may be reviewed and determined by the Supreme Court of Alabama in consonance with law, and that this Honorable Court thereupon proceed to review and correct the errors complained of and to reverse the said judgment of the Court of Appeals, or render such judgment as said court shall have rendered, and suggesting to said Court the stay or recall of its certificate of judgment pending the determination of this petition and decision by this Honorable Court in said cause.

Byron Thornhill, Petitioner, by James J. Mayfield, Attorney for Petitioner.

We hereby certify a copy of the foregoing petition for certiorari was placed in the United States Government mail, properly addressed, and with necessary postage thereon, and forwarded to Hon. Thomas S. Lawson, Attorney general for the State of Alabama, on this the 6th day of June, 1939.

Witness our hands this the 6th day of June, 1939.

Mayfield & Mayfield, by James J. Mayfield, Attorneys for Petitioner.

[fol. 31] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OF SUBMISSION—June 7, 1939

Come the parties by attorneys, and submit this cause on briefs for decision.

[fol. 32] IN SUPREME COURT OF ALABAMA

[Title omitted]

Present:

All the Justices.

ORDER DENYING PETITION FOR CERTIORARI—June 15, 1939

Comes the petitioner by attorneys, and the petition for the Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered that said petition be and the same is hereby denied at the cost of the petitioner.

[fol. 33] IN SUPREME COURT OF ALABAMA

CERTIFICATE OF JUDGMENT

To the Clerk of the Court of Appeals of the State of Alabama, Greeting:

Whereas, by petition in the Supreme Court of Alabama duly filed on the 7th day of June, 1939, in this Court styled: Ex parte Byron Thornhill, Petitioner it was prayed that the Record and Proceedings of said Court of Appeals in a certain cause lately therein pending and proceeding to judgment, appealed from the Circuit Court of Tuscaloosa County, between Byron Thornhill, Appellant, and State of Alabama, Appellee by which judgment it was considered adversely to said petitioner, he brought before our Supreme Court by the writ of certiorari issued out of this Court to said Court of Appeals, for review and determination in consonance with law:

Now, it is hereby certify, That it was thereupon considered by our Supreme Court, on the 15th day of June,

1939, that said application for the Writ of Certiorari to the Court of Appeals be overruled and denied, at the cost of the petitioner.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, at the Capitol, this the 15th day of June, 1939.

J. Render Thomas, Clerk of the Supreme Court.

[fol. 34] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR STAY

To the Honorable Justices of the Supreme Court of Alabama:

MR. JUSTICE ANDERSON, Presiding:

Be It Remembered, that on the 15th day of June, 1939, that this Honorable Court denied certiorari to the Court of Appeals of Alabama, in the above styled cause.

Whereas, the said Byron Thornhill is desirous of having the issues in said cause determined by the Supreme Court of the United States. Particularly, to have that Honorable Body determine whether or not Section 3448 of the Code of Alabama of 1923 contravenes the Constitution of the United States of America.

And Whereas, the said Byron Thornhill is praying the Supreme Court of the United States to grant a Writ of Certiorari directing that the record in this cause be sent up to the Supreme Court of the United States for review.

Therefore, the said Byron Thornhill prays that this Honorable Court will enter the necessary and proper order suspending execution of the judgment and sentence in this cause, and holding the same in abeyance until such time as the Supreme Court of the United States may grant, or deny his aforesaid petition for certiorari.

The Petitioner prays that if he has been mistaken in the relief to which he is entitled, or has improperly pled the same, that this Honorable Body will grant him such relief, as the right and justice of this cause may require.

Respectfully submitted, Mayfield & Mayfield, by James J. Mayfield, Attorney for Byron Thornhill.

[fol. 35] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER GRANTING PETITION FOR STAY

Whereas, Byron Thornhill did on the 5th day of July, 1939, file his petition in this Court requesting that this Court or the Chief Justice thereof enter an order staying or suspending the execution of the judgment and sentence in this cause pending the application of petitioner for a Writ of Certiorari to the Supreme Court of the United States.

Upon consideration of said petition it is ordered by John C. Anderson, as Chief Justice of the Supreme Court of Alabama that the prayer of said petition be granted. It is further ordered that the certificate of affirmance by the Court of Appeals of Alabama and the mandate thereunder be recalled and stayed and held in abeyance and the execution of the judgment and sentence be stayed until final disposition shall have been made of said cause by the Supreme Court of the United States and until the further orders of this Court.

Endorsement: "Granted July 5th, 1939, Jno. C. Anderson, Chief Justice."

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

On consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for certiorari in the above-entitled cause be and same hereby is extended for period of 60 days from this date.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Done this the 12th day of September, 1939.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 11, 1939

The petition herein for a writ of certiorari to the Court of Appeals of the State of Alabama is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5384)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

BYRON THORNHILL,

Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

JAMES J. MAYFIELD,
Counsel for Petitioner.

JOSEPH A. PADWAY,
Of Counsel for Petitioner,
321 Tower Building,
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

BYRON THORNHILL,

Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of Byron Thornhill respectfully shows to this Honorable Court:

A.

Summary Statement of Matter Involved.

1. Byron Thornhill, your petitioner, was president of Local #19974, Creosoters Union, affiliated with the American Federation of Labor. The Brown Wood Preserving Company, Inc., operated a creosoting plant in Tuscaloosa County, Alabama, and employed approximately 100 men including the petitioner. 94 of these men belonged to said

local union. The Creosoters Local Union went out on strike and placed pickets at the entrances to the Company's plant. One Clarence Simpson, an employee of the Company, but not a member of the union, started to return to work at the creosoting plant. The petitioner went up to Simpson and requested him in a peaceable manner, without show of force, direct or implied, not to "go up there" (referring to the plant of the Brown Wood Preserving Company) until the strike was settled. Simpson then voluntarily retired from the vicinity of the plant (R. 9-13).

2. The petitioner was arrested for this action and prosecuted under an Alabama Statute, hereinafter set out, making "picketing and loitering" in a labor dispute a criminal offense.

3. The petitioner resisted prosecution in all the Alabama Courts, on the grounds that the Statute under which he was prosecuted was repugnant to the *XIVth Amendment to the Constitution of the United States* in that it deprived him of freedom of speech and assemblage, and that the court by extending the purview of the Statute of the petitioner's actions on the occasion in question, deprived him of the protection of the due-process clause of said amendment.

4. The Court of Appeals of Alabama affirmed the petitioner's conviction under authority of the cases of *Hardie-Tynes* v. *Cruse*, 189 Ala. 66, 66 So. 657 (Appendix "C" this petition) and *O'Rouke* v. *Birmingham*, 168 So. 206, 27 Ala. App. 133 (Appendix "B"), which cases expressly held that the anti-picketing statute here challenged did not violate the *XIVth Amendment to the United States Constitution;* and held that the petitioner's actions on the occasion in question were within the purview of the prohibition implied in the statute.

B.

Statement as to Jurisdiction.

(a) This Court has jurisdiction to grant the relief prayed, because this is a case wherein was drawn in question the validity and constitutionality of a Statute of the State of Alabama, and the operation thereof, as being repugnant to a provision of the Constitution of the United States. The decision of the highest court of Alabama in which a decision could be had, was in favor of the validity of said Statute and its operation.

2. The *Act of Congress of February 13th, 1935, Section 237 b, 28 U. S. C. A. 344, page 205,* gives jurisdiction to this Court, "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question—the validity of a statute of any State on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States".

(b) The statute, the validity of which is here drawn into question, is Alabama's anti-picketing law: *Section 3448, Code of Alabama, 1923. Volume 2, Page 98, official edition.*

> LOITERING AND PICKETING FORBIDDEN.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket

the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

(c) 1. The judgment which petitioner prays this Court to review was rendered by the Court of Appeals of Alabama, on January 7th, 1939. That court denied petitioner's motion for rehearing in this cause on May 23rd, 1939 (R. 18). The Supreme Court of Alabama denied the petitioner's petition for a writ of certiorari on June 15th, 1939 (R. 22). On September 12th, 1939, Mr. Justice Hugo L. Black, by appropriate order extended the time for filing of this petition until November 12th, 1939 (R. 24).

2. The decision of the Court of Appeals in this cause appears at *189 So. 913*, certiorari denied by Supreme Court, *189 So. 914, July 20th, 1939, Advance Sheet*, (Appendix "A") this petition.

3. In this case it is contended that Alabama's anti-picketing statute, *Section 3448, Code of 1923, supra*, deprives the petitioner of his guarantees of freedom of speech and assemblage, and that the application of the statute to him violates the due-process clause of the *XIVth Amendment to the Constitution of the United States*. The cases below, among others, are authority for the proposition that freedom of speech and assemblage are protected by the *XIVth Amendment*.

Lovell v. *Griffin*, 303 U. S. 444;
C. I. O. v. *Hague*, 59 S. Ct. 954.

4. The constitutional questions raised are serious and not frivolous.

Zutch v. *King*, 260 U. S. 174, 176;
Lovell v. *Griffin, supra.*

The purpose of the petitioner is to show that the statute here questioned is not a valid exercise of the police power of the State of Alabama, but is in effect an unauthorized assumption of despotic authority, for the purpose of suppressing free speech and assemblage, and preventing collective action by workers to better their working conditions.

Rulings of the Alabama Courts.

5. In the Inferior Court of Tuscaloosa County, Alabama, the petitioner filed demurrers (R. 3) to the affidavit and warrant (R. 1), charging that *Section 3448, supra,* was violative of the due-process clause of the *XIVth Amendment, supra,* and specifically that his constitutionally guaranteed rights of freedom of speech and assemblage were impugned by said statute. Petitioner was convicted of "picketing and loitering" and fined $100 and costs (R. 5).

In the Circuit Court of Tuscaloosa County, a trial *de novo* was had and the petitioner refiled the said demurrers (R. 6) to the complaint of the State (R. 5). Petitioner further made a timely motion to exclude the State's evidence on the ground "that the Statute under which the petitioner is being prosecuted is violative of the Constitution of the United States." This motion was denied and petitioner duly reserved exception (R. 13). He was here convicted of "picketing and loitering" and fined $100 and costs.

The Court of Appeals of Alabama affirmed the conviction of the Circuit Court (R. 22). It will be noted that in criminal cases it is the duty of the Court of Appeals to examine the whole record without specific assignment of error, *Section 3258, Code of Alabama, 1923.* The court considered the Federal right in its opinion:

> "the only question involved in this appeal is the constitutionality *vel non* of Section 3448", *supra* (R. 16).

and

> "It seems clear that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he is being prosecuted, within the purview of the prohibition implied in the statute."

The Court of Appeals held that it was bound by two former Supreme Court decisions: *O'Rouke* v. *Birmingham*, 27 Ala. App. 133, 168 So. 206, certiorari denied 168 So. 209, and *Hardie-Tynes* v. *Cruise*, 189 Ala. 66, 66 So. 657 (R. 17), and affirmed this case under the authority of these decisions. (The Alabama Court of Appeals is bound by decisions of Supreme Court on constitutional questions, *Section 7318, Code of Alabama, 1923.*) Therefore the pertinent portions of these cases are attached herewith as Appendix "B" and "C" in conformity with Rule 12, Section 1, Paragraph 4, Rules of this Court.

The Court of Appeals denied a motion for rehearing (R. 18).

The petitioner prayed a writ of certiorari of the Supreme Court of Alabama to the Court of Appeals (R. 20) and made, among others, the following assignments:

> "4. That the Court of Appeals erred in attempting to extend the purview of *Section 3448 of the Code of Alabama, 1923*, to the petitioner and the facts at bar."

> "5. That the Court of Appeals erred in holding that *Section 3448 of the Code of Alabama, 1923*, was not violative of the *XIVth Amendment to the Constitution of the United States.*"

> "7. That the Court of Appeals erred in holding that *Section 3448 of the Code of Alabama, 1923*, was not violative of the due-process clause of the Constitution of the United States."

> "8. That the Court of Appeals erred in holding that *Section 3448 of the Code of Alabama, 1923*, was not violative of the Constitution of the United States."

The Supreme Court denied certiorari (R. 22).

The petitioner avers that the demurrers, motion, and assignments of error, set out in this section were sufficient to raise a Federal question and bring this case within the jurisdiction statute, heretofore set out.

The Questions Presented.

The questions here brought forward are:

1. Whether or not Alabama's anti-picketing law, *Section 3448, supra;* is violative of the *XIVth Amendment to the Constitution of the United States* in that it deprives the petitioner of freedom of speech and assemblage.

2. Whether or not the Alabama courts deprived the petitioner of the protection of the due-process of law clause of the *XIVth Amendment, supra,* by holding that petitioner's actions on the occasion in question, were within the purview of the prohibition implied in the statute; i.e. *Section 3448, supra.*

Reasons Relied on for Allowance of Writ.

1. The Court of Appeals of Alabama has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way not in accord with the applicable decisions of this Court. *Supreme Court Rule 38, Section 5 a.*

A copy of the entire record in this case, as certified to be true and correct, by the Clerk of the Court of Appeals, and the Clerk of the Supreme Court of Alabama, is hereby furnished, attached to, and made a part of this application in compliance with *Rule 38, Paragraph 1,* of the Rules of this Court.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable

Court, directed to the Court of Appeals of Alabama, commanding that court to certify and send to this Court for review and determinatnon, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled, Docket No. 4243, *Byron Thornhill* v. *State of Alabama and Ex Parte Byron Thornhill*, and that the judgment of the Court of Appeals of Alabama may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may seem meet and just; and your petitioner will ever pray.

BYRON THORNHILL,
By JAMES J. MAYFIELD,
Counsel for Petitioner.

JOSEPH A. PADWAY,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

BYRON THORNHILL,

Petitioner,

v.

THE STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion on the Court of Appeals of Alabama is reported at 189 So. 913, Certiorari denied by the Supreme Court 189 So. 914, July 20th, 1939, Advance Sheet (Appendix "A") this petition.

II.

Jurisdiction.

1. The statutory provision is Judicial Code, Section 237-B as amended by the Acts February 13, 1925, 28 U. S. C. A. Section 344, Page 205.

2. The date of the judgment of the Court of Appeals of Alabama, is January 7th, 1939, certiorari denied by Supreme Court of Alabama, July 15, 1939. On September 12,

1939, Mr. Justice Hugo L. Black by appropriate order extended the time for filing of this petition until November 12, 1939.

3. The nature of the case and rulings below brings the case within the jurisdictional provision of Section 237-B, *supra*. Claim of Federal constitutional right was raised by demurrer at the original trial in the Inferior Court of Tuscaloosa County, Alabama, and was again raised by demurrer and by motion to exclude the State's evidence, upon a trial *de novo* had in the Circuit Court of Tuscaloosa County, Alabama, and denied. The Court of Appeals of the State of Alabama in its opinion specifically passed upon the claim of Federal right and denied the same. The question was again presented to the Supreme Court of Alabama by petition for certiorari, and the Supreme Court denied certiorari.

The Federal right claimed by the petitioner is that the Statute under which he was convicted, is upon its face as applied to him, unconstitutional in denying to him due-process of law under the *XIVth Amendment to the Constitution of the United States*. This claim is grounded upon the contention that Alabama's anti-picketing law, which prohibits picketing, even though peaceful, deprives the petitioner of freedom of speech and assemblage; and that the Court of Appeals of Alabama denied him the protection of the due-process of law clause of the XIVth Amendment, by extending the purview of the statute to the petitioner's actions on the occasion in question. The statute in question is as follows:

Section 3448, Code of Alabama, 1923.

"Loitering or Picketing Forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for

the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

4. The following cases among others sustain the jurisdiction:

Lovell v. *Griffin*, 303 U. S. 444;
C. I. O. v. *Hague*, 59 S. Ct. 954.

III.

Statement of the Case.

Petitioner was charged with "picketing and loitering" in a labor dispute in violation of the above statute. Petitioner's action on the occasion in question consisted of asking another employee without threats, or show of force, direct or implied, not to resume his employment in an industrial plant until a strike, then in progress, was settled (R. 9-13). The Court of Appeals held that the constitutionality of the statute was established by two previous decisions of the Supreme Court of Alabama, *Hardie-Tynes* v. *Cruise*, 189 Ala. 66, 66 So. 657, and *O'Rouke* v. *City of Birmingham*, 168 So. 206, 27 Ala. App. 133 (Appendix "B" and "C"), this petition. The Court interpreted the statute in the case at bar, as preventing any picketing whatsoever, regardless of whether or not it was peaceful and further construed the statute as preventing one worker asking another worker not to accept employment in an employer's plant.

IV.

Errors Assigned.

1. That the courts of Alabama erred in holding that *Section 3448 of the Code of Alabama, 1923, supra,* was not violative of the *XIVth Amendment to the Constitution of the United States.*

2. That the courts of Alabama deprived the petitioner of the protection of the due-process of law clause of the XIVth Amendment, by extending the purview of Section 3448, *supra,* to the petitioner's actions on the occasion in question.

Point I.

That the Alabama Anti-Picketing Statute, Section 3448 of the Code of Alabama, 1923, supra, violates the XIVth Amendment to the Constitution of the United States.

Colorado recently in *Peoples* v. *Harris,* 91 Pacific 2nd 993, held that an anti-picketing statute which is almost identical with the statute here challenged, as violative of the *XIVth Amendment to the Constitution of the United States.* The Colorado Supreme Court said, "only one other State, Alabama, has a similar statute. —, it is argued that peaceful picketing is a crime under Section 90, *supra,* (Colorado's Anti-Picketing Law). If the Legislative intent requires such a construction, then the law must under the stipulated facts, be held unconstitutional as being a denial of freedom of speech —. If this contention is upheld (that peaceful picketing is unlawful), we have what amounts to an exercise of arbitrary power in violation of the due-process of law provision contained in the XIVth Amendment".

A comparison of Section 3448 of the Code of Alabama, 1923, *supra,* and the statute which Colorado Supreme Court held to be violative of the XIVth Amendment leads one in-

escapably to the conclusion that the draftman of the Alabama Statute used the Colorado Statute as a model.

We think the fact that Colorado has decided that an almost identical statute is unconstitutional is strong argument that this Court should carefully examine the validity of the Alabama statute here presented.

This Court recently said in the case of *C. I. O.* v. *Hague*, 59 S. Ct. 985.

> "It has been explicity and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due-process clause of the Fourteenth Amendment".

Mr. Justice Butler, in his dissenting opinion in the case of *Senn* v. *Tile Layers Union*, 57 S. Ct. at page 867, 81 L. Ed. 1229, said:

> "The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer".

Yet the Alabama Court said in the *Hardie-Tynes* case, 66 So. at page 657, *supra*,

> "Perhaps our Legislature has taken the view, adopted by some of the Courts, that the actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effects of our statutes".

If that is the "effects of the statutes" then they must fall. By the express statement of the prosecuting witness in the case at bar, the petitioner's actions were entirely peaceful. There was probably never a "peaceful election", yet it would be absurd to argue that simply because elections are not peaceful that the right of citizens to discuss them is

not protected by the guarantee of freedom of speech; and that the State under the guise of its police power can restrict a citizen's right to discuss or hold elections.

In the case of *Herndon* v. *Lowry*, 301 U. S. 242, this Court said,

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the principle of the Constitution".

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

There is certainly no question involved in this case of the safety of the State. But the right here sought to be protected by the Legislature is the employer's right to maintain the *status quo* without interference by his employees. For the Alabama courts to hold that one American workman cannot freely speak his sentiments to another American workman, concerning their mutual working conditions, is to indoctrinate our law with a philosophy foreign to English speaking people, and strike down the fundamental guarantees they have won in their Bill of Rights.

The court of Alabama, in the case of *Hardie-Tynes* v. *Cruise, supra,* further said in discussing picketing:

> "The 'liberty' guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is the tritest truism to say that every man must renounce unbridled license".

To hold that peaceful discussion of working conditions is, "unbridled license", is to stretch the imagination beyond the breaking point. The rights of peaceful assembly and freedom of speech, are sacred rights wrung from despotic sovereigns, intent, on exercising "unbridled license" in the government of their subjects.

The Alabama court further said in the *Hardie-Tynes* case, *supra,*

> "If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of the other to pursue his business unmolested?"

The petitioner confesses that he knows of no constitutional right that the employer has to "pursue his business unmolested", especially a right to pursue that business unmolested by reasonable, and peaceful argument, on the part of his employees, for humane treatment and a decent standard of living. As to this argument Colorado said in the case of *People* v. *Harris, supra,*

> "The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is damnum absque injuria".

Point II.

The petition's conviction was without due-process of law in violation of his right of freedom of speech.

The Court of Appeals of Alabama in its opinion in this case (R. 20) said:

> "The evidence adduced upon the trial was sufficient to bring the appellants actions, for which he was being prosecuted, within the purview of the prohibition implied in the statute."

Are citizens to be convicted for the violation of prohibitions that are merely "implied in the statute"? If so, clearly, the courts are exercising arbitrary authority in violation of the due-process of law clause of the *XIVth Amendment*.

The criminal misconduct for which the petitioner was convicted consisted of requesting his fellow worker not to return to work until a strike was settled. Certainly there is nothing in the petitioner's action here to justify a reasonable apprehension of danger to the organized government of the State so as to admit an abridgment of freedom of speech. In *De Jonge* v. *Oregon*, 299 U. S. 363, the Chief Justice in speaking of the Legislature's right to abridge freedom of speech and assembly,

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly

in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

It is well settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon* v. *Lowry, supra.* An examination of the facts in this case and the case of *O'Rouke* v. *City of Birmingham, supra,* will show that this statute is being ruthlessly applied in Alabama to protect the economic interest of the employer against the human rights of the worker. It is regrettable that the published opinions do not contain more instances of the manner in which the statute is applied. In the vast majority of these "applications" the prisoner is unable to appeal.

Freedom of speech is a part of the political inheritance which Americans derived from the mother country; it is our birthright and it is the duty of the State to which we have delegated the right to govern us, to protect and enforce it; but only through stubborn resistance to the exercise of arbitrary power will it be preserved to us. The fact that picketing is distasteful to a group of legislators should not be warrant to them, under pretext of exercising the police power to preserve order, to abridge freedom of speech.

A mere threat of disorder cannot be seized upon as valid excuse for abridging the fundamental guarantees of the Bill of Rights. As Mr. Justice Brandeis said of the generation that included those who inserted these guarantees into the Constitution:

"Those who won our independence by revolution were not cowards. They did not fear political change. They

did not exalt order at the cost of liberty. Whitney *v.* California, 274 U. S. 357, at 377."

Summary and Conclusion.

We have undertaken to show that the Alabama Legislature in forbidding peaceful picketing has violated one of the most necessary and sacred of American rights—the right of freedom of speech.

The construction placed upon the statute by the Alabama courts is such as to deny workers the right to assemble and discuss their working conditions with their fellow workers in the vicinity of their employer's plant.

The petitioner submits that the relief prayed should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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APPENDIX "A"

Thornhill v. State, 189 So. 913.

RICE, *Judge:*

Section 3448 of the Code of 1923 reads as follows: "Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

Appellant was convicted of the offense denounced by the above Code section.

It seems clear enough that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he was being prosecuted, within the purview of the prohibition implied in said Statute.

So, as conceded by able counsel here representing appellant, "the only question involved in this appeal is the constitutionality vel non of Section 3448 of the Code of Alabama of 1923."

And, as further conceded by the said counsel, this exact question has been heretofore decided both by this court and the Supreme Court—this court of course merely following the decision by the Supreme Court, as it was required to do (Code 1923, Sec. 7318)—adversely to the contentions here urged against the validity of said Statute. See O'Rouke *v.* City of Birmingham, 27 Ala. App. 133, 168 So. 206, certiorari denied 232 Ala. 355, 168 So. 209; and Hardie-Tynes Mfg. Company *v.* Cruise et al., 189 Ala. 66, 66 So. 657.

It results, there is nothing for us to do but affirm the judgment of conviction. Code Section 7318, supra.

Which we hereby do.

Affirmed.

Certiorari Denied, 189 So. 914.

APPENDIX "B".

O'Rouke v. City of Birmingham, 168 So. 206.

——"Defendant spoke to no person, simply walking slowly and peacefully back and forth along the sidewalk immediately in front of said theatre with said sign or placard being exhibited so as to be visible to persons walking along the street near said theatre and was so conducting himself when he was arrested. At the time that the above matters transpired, there was a labor dispute in existence as said theatre had locked out union employees (stage hands) and said Ritz Theatre had just previously thereto refused to work stage hands who were members of any union affiliated with the American Federation of Labor, and at the time was working men who were not regularly employed as stage hands, in the work ordinarily being done by stage hands in violation of the National Industrial Recovery Act. At the times above referred to, Ritz Theatre was not working any person holding membership in any union affiliated with the American Federation of Labor. The purpose of the defendant's conduct, as above described, was to advise customers of said theatre and prospective customers of said theatre, of the relationship existing between the Ritz Theatre and its employees, and to influence such customers and prospective customers not to patronize said theatre on account of said theatre's failure and refusal to employ persons who were members of Labor unions affiliated with the American Federation of Labor.

"All of the above matters and things occurred within the City of Birmingham, Alabama, prior to and within 12 months prior to the commencement of the prosecution in this case."

The court adjudged the defendant guilty and pronounced and entered judgement accordingly.

As stated, the controlling question on this appeal is the validity of the statutes above quoted; it being the insistence of the appellant that these statutes, in fact the entire chapter 91 of the Code 1923, are unconstitutional, and that the conviction of this appellant thereunder cannot stand.

We have read carefully and attentively and with interest the elaborate and exhaustive briefs of respective counsel in this case, and command them for their earnestness and untiring efforts. The province of this Court is limited with reference to constitutional questions. Sections 7322 of the Code 1923 (superseding section 7310 of the Code 1923) provides, before the Court of Appeals should strike down any statute, federal or state, not previously nullified by the Supreme Court, the question involving the validity of same must be submitted to the Supreme Court for determination; the result shall be transmitted to the Court of Appeals, which said court shall be controlled in its decision by the determination of the Supreme Court. This statute also provides when a statute has been assailed upon constitutional grounds in the Court of Appeals, and is upheld by this court, the aggrieved party may review the rulings of this court in this particular by writ of error, etc. In view of the foregoing provisions, we will refrain from an extended discussion of the conclusion here entertained to the effect that the insistences of appellant to the effect that chapter 91 of the Code 1923 is unconstitutional are not well taken and cannot be sustained. So far as we are able to ascertain, the statute in question are valid enactments and the provisions of the statutes in question in no manner offend the Constitution of this state. This is our conclusion after a careful and attentive consideration of the questions, in all of their phases, has been accorded. Moreover, it appears that the Supreme Court of this state has directly held this in the case of Hardie-Tynes Mfg. Co. v. Cruise et al., 189 Ala. 66, 66 So. 657, 660. In said case, Mr. Justice Somerville, speaking for the court, said: "The English and American courts have, we believe, without exception, held that the right to conduct one's business, without the wrongful and injurious interference of others, is a valuable property right which

will be protected, if necessary, by the injunctive processes of equity."

And further in the opinion, supra, the court said: "No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none. Certain it is a right to actively and directly interfere with and prevent the operation of the lawful business of another is not included among the inalienable rights of 'life, liberty, and the pursuit of happiness'. The 'liberty' guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is but the triest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other to pursue his business unmolested? It is clear that this motion of liberty utterly ignores 'the other fellow,' and denies to him the very freedom it is claiming for itself."

Other cases of like import could be cited, but, for the reasons hereinabove stated, we refrain from prolonging this opinion.

We find no error in the points of decision presented. It follows that the judgment of the lower court from which this appeal was taken must be, and is, affirmed.

Affirmed.

ON REHEARING.

On application for rehearing, able counsel for appellant earnestly insist we extend our opinion in this case in the manner hereinafter discussed. This court, having no inclination to deprive the appellant of any legal right or to retard in any manner his full right of review of every pertinent question involved, therefore grants the request aforesaid and holds directly that which has already, in said opinion, been impliedly held, from the authorities cited, by which we are governed and controlled, that in overruling

the demurrers to the complaint in this cause, and the application of the provisions of chapter 91 of the Code of Alabama 1923, the trial court acted without error. We are of the opinion that the ruling complained of had no tendency to deprive the appellant of his rights, powers, privileges, and immunities as secured and guaranteed to him by the provisions of the Fourteenth Amendment to the Constitution of the United States.

Application overruled. 168 So. 209.

APPENDIX "C".

Hardie-Tynes Mfg. Co. v. Cruise et al., 66 So. 657.

(From a decree refusing an injunction to enjoin peaceful picketing, the complainant appeals.)

——The meaning and purpose of these provisions are, we think, too plain for serious discussion. Sections 6394 and 6856 are broad enough to include even the peaceful persuasion of would-be employees not to serve an employer, if its intention and effect is to prevent the operation of a lawful business. And while the courts do not undertake to enjoin the conspiracy itself, the execution of the conspiracy would be a criminal tort against the employer's property rights which may be prevented by injunction. Section 6395 is more specific in its inhibition of such forms of "peaceful interference," and expressly forbids picketing when it is done "for the purpose of interfering with or injuring any lawful business or enterprise." Perhaps our Legislature has taken the view, adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes.—It is suggested by counsel for respondents that our construction of Section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none. Certain it is that a right to actively and directly interfere with and prevent the operation of the lawful business of another is not included among the inalienable rights of "life, liberty, and the pursuit of happi-

ness." The "liberty" guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other to pursue his business unmolested? It is clear that this notion of liberty utterly ignores "the other fellow", and denies to him the very freedom it is claiming for itself.—Reversed and rendered.

(4486)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 514

BYRON THORNHILL,

Petitioner,

vs.

THE STATE OF ALABAMA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR THE PETITIONER

JAMES J. MAYFIELD,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 514

BYRON THORNHILL,

Petitioner,

vs.

THE STATE OF ALABAMA

ON THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

BRIEF OF THE PETITIONER

I

Nature of Appeal and History of Procedure

This is an appeal from the judgment of the Court of Appeals of Alabama, Sixth Division, rendered on January 17, 1939, which affirmed a judgment of the Circuit Court of Tuscaloosa County, State of Alabama, rendered on the 20th day of December, 1937, wherein Byron Thornhill was found guilty of violating Section 3448, Code of Alabama, 1923, entitled "Loitering or Picketing Forbidden." Ap-

plication for rehearing having been filed and denied, a writ of certiorari was petitioned for in the Supreme Court of Alabama (T. R. page 20). On June 15, 1939, the Supreme Court of Alabama denied the petition for certiorari. Certificate of judgment, based on such denial, was recorded on the 15th day of June, 1939 (T. R. page 22). The Court of Appeals of Alabama filed a written opinion (T. R. page 16). Said opinion is reported at 189 So. 914 (July 20, 1939), and is also set forth in Appendix "A", printed together with the petition for writ of certiorari on file herein.

II

Jurisdiction

The statutory provision is Judicial Code, Section 237-B, as amended by the Acts of February 13, 1925, 28 U. S. C. A., Section 344, page 205.

III

Provisions of the Constitution in Question and Statutes Involved

The Federal right claimed by the petitioner is that the Statute under which he was convicted is upon its face, as applied to him, unconstitutional in denying to him due-process of law under the *XIVth Amendment to the Constitution of the United States.* This claim is grounded upon the contention that Alabama's anti-picketing law, which prohibits picketing, even though peaceful, deprives the petitioner of freedom of speech and assemblage; and that the Court of Appeals of Alabama denied him the protection of the "due-process" clause of the XIVth Amendment, by extending the purview of the statute to the petitioner's actions on the occasion in question. The statute in question is as follows:

Section 3448, Code of Alabama, 1923:

> "Loitering or Picketing Forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

IV

Statement of the Case

Petitioner was charged with "picketing and loitering" in connection with a labor dispute in violation of the above statute. Petitioner's action on the occasion in question consisted of asking another employee without threats, or show of force, direct or implied, not to resume his employment in an industrial plant until a strike, then in progress, was settled (R. 9-13). The Court of Appeals held that the constitutionality of the statute was established by two previous decisions of the Supreme Court of Alabama, *Hardie-Tynes* v. *Cruise*, 189 Ala. 66, 66, So. 657, and *O'Rourke* v. *City of Birmingham*, 169 So. 206, 27 Ala. App. 133. (See Appendix "B" and "C" of the petition for writ where these decisions are set forth.) The Court interpreted the statute in the case at bar as preventing any picketing whatsoever, regardless of whether or not it was peaceful, and further construed the statute as preventing one worker asking another worker not to accept employment in an employer's plant.

The foregoing is the statement of the case as set forth in the petition for writ of certiorari (page 11). However, in view of the statement of certain facts and the omission of their qualifying and explanatory facts, set out in the brief of the Attorney General of Alabama, the petitioner considers it necessary to call to the Court's attention certain additional portions of the record.

In the Attorney General's brief the statement is made that the picket line was on company property, the inference being that the petitioner was a trespasser. The record shows, however (R. 12), that Brownville is a company town:

> "The union meets on property of Brown Wood Preserving Company; the company has not made demand on the men since the strike was called, not to come on company property. The employees get their mail from a United States' Post Office located on company property—practically all the men who work in the plant of the Brown Wood Preserving Company live on company property—the picket post which I have referred to were tents in which the men stayed to keep warm in cold weather."

The State hints at intimidations and coercions by pointing out that 6 or 8 men were in and around these tents or picket posts, but as shown by the Record (R. 10) the prosecuting witness for the State testified:

> "none of the other men said anything to me",

and further

> "neither Mr. Thornhill nor any other employee threatened me on the occasion testified to."

The prosecuting witness goes further and, without objection on the part of the State, testified to the state of his own mind:

"Mr. Thornhill approached me in a peaceful manner *and did not put me in fear;* he did not appear to be mad."

The only other witness for the state testified as follows:

"At the time Mr. Thornhill and Clarence Simpson were talking to each other there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man."

V

Errors Assigned

1. That the courts of Alabama erred in holding that *Section 3448 of the Code of Alabama, 1923, supra,* was not violative of the *XIVth Amendment to the Constitution of the United States.*

2. That the courts of Alabama deprived the petitioner of the protection of the due-process of law clause of the XIVth Amendment, by extending the purview of Section 3448, *supra,* to the petitioner's actions on the occasion in question. (Both errors assigned will be discussed together.)

ARGUMENT

Point 1

That the Alabama Anti-Picketing Statute, Section 3448 of the Code of Alabama, 1923, Supra, Violates the VIXth Amendment to the Constitution of the United States

It is clear from the facts in this case that we are dealing with a conviction for peaceful picketing and that the Alabama Court construed the statute to prohibit peaceful picketing. That statute must be tested in the light of its construction by the courts of Alabama. *Truax* v. *Corrigan,* 257 U. S. 312. There is no room for question that the Court construed the statute as prohibiting peaceful picketing. It based its

decision in this case on *O'Rourke* v. *City of Birmingham*, 168 So. 206; and *Hardie-Tynes Mfg. Co.* v. *Cruise, et al.*, 66 So. 657.

In the *O'Rourke* case the Court said:

> "Defendant spoke to no person, simply walking slowly and peacefully back and forth along the sidewalk immediately in front of said theatre with said sign or placard being exhibited so as to be visible to persons walking along the street near said theatre and was so conducting himself when he was arrested.
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> • • • • • • •
>
> "The purpose of the defendant's conduct, as above described, was to advise customers of said theatre and prospective customers of said theatre, of the relationship existing between the Ritz Theatre and its employees, and to influence such customers and prospective customers not to patronize said theatre on account of said theatre's failure and refusal to employ persons who were members of Labor unions affiliated with the American Federation of Labor."

In the *Hardie-Tynes Mfg. Co.* case, the Court said:

> "The meaning and purpose of these provisions are, we think, too plain for serious discussion. Sections 6394 and 6856 are broad enough to include even the peaceful persuasion of would-be employees not to serve an employer, if its intention and effect is to prevent the operation of a lawful business. • • • Perhaps our Legislature has taken the view, adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes."

As so construed, is the statute constitutional?

In *Peoples* v. *Harris*, 91 Pac. (2d) 993, the Supreme Court of Colorado recently held that Colorado's Anti-Picketing Statutes was unconstitutional in that it violated the "due-

process" clause of the *XIVth Amendment to the Constitution of the United States.* For the purpose of comparison and to show the identical nature of these two statutes, the Colorado statute declared unconstitutional and the Alabama statute here challenged are set out in parallel columns.

SECTION 90, CHAPTER 97, 1935, COLORADO STATUTE ANNOTATED	SECTION 3448, CODE OF ALABAMA, 1923, "LOITERING OR PICKETING FORBIDDEN"
"It shall be unlawful for any person or persons to loiter about or patrol the streets, alleys, roads, highways, trails or place of business of any person, firm or corporation engaged in any lawful business, for the purpose of influencing, or inducing others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation, or to picket the works, mine, building or other place of business or occupation of such other person, persons, firm or corporation, for the purpose of obstructing or interferring with or injuring any lawful business, work, or enterprise; provided, that nothing herein shall prevent any person from soliciting trade, custom or business for a competitive business."	"Any person or persons, who without a just cause or a legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, having business dealings with, or be employed by such other persons, firm, corporation, or association, or who pickets the works or place of business of such other person, firm, corporation, or associations of persons, for the purpose of hindering, delaying or interferring with, or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; nothing herein shall prevent any person from soliciting trade or business from a competitive business."

In its discussion of the above statute the Colorado Court said at page 990:

> "Section 90, *supra*, was enacted by the legislature in 1905. *Only one other state, Alabama, has a similar law.* No litigation involving its construction has ever reached this Court.
>
> "Every student of the law will readily admit that changes have occurred since the enactment of Section 90, *supra*, relating to labor disputes. Much statute law has since been enacted in the interest of labor and in its lawful rights to secure reasonable wage levels. It is quite universally conceded now that labor has a right to organize and to lawfully protect its economic interest. * * * It is generally admitted that the right of collective bargaining is here to stay. The need in our economic life of organized labor as an important factor in maintaining wage levels is generally accepted."

The Colorado Court further said — this case, at page 991:

> "By a great weight of authority, peaceful picketing, so long as it does not in fact involve force, intimidation, breach of the peace, or coercion, has been sustained in many cases."
>
> *Pope Motor Car Company* v. *Keevan C. C.*, 150 Fed. 148.
>
> *Niles* v. *Bement-Pond Company* v. *The Iron Moulders' Union, D. C.*, 246 Fed. 851.
>
> *Great Northern Railway Company* v. *Brosseau*, 286 Fed. 414.
>
> *American Steel Foundries* v. *The Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72.
>
> *Senn* v. *Tile Layers' Union*, 301 U. S. 468, 57 S. Ct. 857.

See also the recent case of *The City of Yakima* v. *Gorham*, decided September 27, 1939, 94 Pac. (2d) 180.

In the majority of jurisdictions in this country peaceful picketing is legal. It is true that some jurisdictions have legislation which expressly legalizes peaceful picketing.

However, in those jurisdictions in discussing the legislation the Court refer to the fact that prior to the adoption of the legislation peaceful picketing was legal in said states.

Exchange Bakery & Restaurant v. *Rifkin*, 245 N. Y. 260, 157 N. E. 130;

Bayonne Textile Corp. v. *American Federation of Silk Workers*, 116 N. J. Eq. 146, 172 A. 551;

Steffes v. *Motion Picture Mach. Operators Union*, 136 Minn. 200, 161 N. W. 524;

Kirmse v. *Adler*, 311 Pa. 78, 166 A. 566;

United Chain Theatres v. *Philadelphia Moving Picture M. O. Union* (*D. C.*), 50 F. (2d) 189;

S. A. Clark Lunch Co. v. *Cleveland Waiters & Beverage Dispensers*, 22 Ohio App. 265, 154 N. E. 362;

Blumauer v. *Portland Moving Picture M. O. P. Union*, 141 Or. 399, 17 P. (2d) 1115;

Cinderella Theatre Co. v. *Sign Writers' Local Union*, (*D. C.*), 6 F. Supp. 164;

Fenske Bros. v. *Upholsterers' International Union*, 358 Ill. 239, 139 N. E. 112, 97 A. L. R. 1318;

Dean v. *Mayo* (*D. C.*), 8 F. Supp. 73;

Miller Parlor Furniture Co. v. *Furniture Workers' Industrial Union*, (*D. C.*), 8 F. Supp. 209;

National Protective Asso. v. *Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648;

Mann v. *Raimist*, 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669;

Wise Shoe Co. v. *Lowenthal*, 266 N. Y. 264, 194 N. E. 749;

Curran v. *Galen*, 152 N. Y. 53, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496;

Jacobs v. *Cohen*, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280;

Kissam v. *United States Printing Co.*, 199 N. Y. 76, 92 N. E. 214;

Roddy v. *United Mine Workers*, 41 Okla. 621, 139 P. 126, L. R. A. 1915D, 789;

Shaughnessy v. *Jordan*, 184 Ind. 499, 111 N. E. 622;

Grace Co. v. *Williams*, (*D. C.*), 20 F. Supp. 263;

L. L. Coryell & Son v. *Petroleum Workers Union*, (*D. C.*), 19 F. Supp. 749;

American Furniture Co. v. *I. B. of T. C. & H.*, 222 Wis. 338, 268 N. W. 250, 106 A. L. R. 335;

Geo. R. Wallace Co. v. *International Asso. M. M. H. L.*, 155 Or. 652, 63 P. (2d) 1090;

Starr v. *Laundry & D. C. W. L. Union*, 155 Or. 634, 63 P. (2d) 1104;

Levering & G. Co. v. *Morrin* (C. C. A. 2d) 71 F. (2d) 284, writ of certiorari denied in 293 U. S. 595, 76 L. Ed. 688, 55 S. Ct. 110;

La France Elec. Supply Co. v. *International Brotherhood of Elec. Workers*, 108 Ohio St. 61, 140 N. E. 899;

McCormick v. *Fisher & Local Union #216 Hotel and Rest. Employees*, 13 Ohio Cir. Ct. R. (N.S.) 545;

Riggs v. *Cincinnati Waiters Alliance Local*, 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565;

Jones v. *Van Winkle Gin & Mach. Works*, 131 Ga. 336, 340, 17 L. R. A. (N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236;

Karges Furniture Co. v. *Amalgamated Woodworkers Local Union*, 165 Ind. 421, 430, 431, 2 L. R. A. (N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829;

Everett Waddey Co. v. *Richmond Typographical Union*, 105 Va. 188, 197, 5 L. R. A. (N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798;

Stoner v. *Robert*, 53 Wash. L. Rep. 437;

Empire Theatre Co. v. *Cloke*, 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107;

Mills v. *United States Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185, affirmed in 199 N. Y. 76, 92 N. E. 214;

Ex Parte Sweitzer, 13 Okla. Crim. Rep. 154, 162 Pac. 1134;

White Mountain Freezer Co. v. *Murphy*, 78 N. H. 398, 101 Atl. 357;

American Engineering Co. v. *International Moulders' Union*, 25 Pa. Dist. R. 564;

Iron Moulders' Union v. *Allis-Chalmers Co.*, 20 L. R. A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45;

St. Louis v. *Gloner*, 210 Mo. 502, 15 L. R. A. (N.S.) 973, 124 Am. St. Rep. 750, 109 S. W. 30.

The above are among a legion of cases holding that, in the absence of legislation on the subject, peaceful picketing is lawful. At page 992 of *People* v. *Harris, supra*, the Colorado Court further said in discussing picketing:

> "It is an appeal to the public and to the members of the union not to patronize an employer who does not conform to the standards of organized labor relative to wages, hours, and conditions of employment. The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is *damnum absque injuria* * * * such loss, under our social and economic system, is merely the result of a conflict of interest between capital and labor."

Further at page 993

> "It is argued that peaceful picketing is a crime under section 90, *supra*. If the legislative intent requires such a construction, then the law must, within the limits of the stipulated facts, be held to be unconstitutional as being a denial of freedom of speech. Those who seek reversal necessarily must contend that said section prohibits peaceful picketing of any kind, at any time, at any place near the employer's premises, and in any manner.' If this contention is upheld, we have what amounts to an exercise of arbitrary power *in violation of the due-process of law provision contained in*

Amendment XIV." • • • "we are not here concerned with a statute which only regulates peaceful picketing, but one which forbids it. This unqualified prohibition would, in our opinion, violate 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

The Colorado Court further said in the same case at page 993,

> "The case of *Hardie-Tynes Manufacturing Company* v. *Cruise*, 189 Ala. 66, 66 So. 657, 661 (*one of the cases on the authority of which the conviction of the petitioner in the instant case was affirmed*) is cited as authority to the point that Section 90 *supra*, forbids peaceful picketing. That, undoubtedly, is the effect of the case. The question of the constitutionality of the Alabama Act was there raised and the Court said 'no intimation is offered as to what provision of the Constitution is hereby offended and we can think of none'. We may assume that since no criminal offense was involved in the *Hardie-Tynes* Case that the Constitutional questions presented in the instant case was not seriously considered in that litigation."

But, on rehearing in the *O'Rourke* Case, the other case on the authority of which the petitioner's conviction was sustained, the Alabama Court directly held that the Alabama statute did not deprive the defendant of the protection of the due-process of law clause of the XIVth Amendment. (Appendix "B" Brief in support of Petition for Certiorari.)

And further at page 994,

> "It cannot be successfully maintained that guarantees of freedom of speech are less important than guarantees relating to property • • • whatever our individual views may be on economic controversies such as involved here, we cannot consent to legislative invasion of constitutional guarantees to the extent for which contention is made in this case. The line of

demarcation between police power and constitutional guarantees is not always well defined. Where a law, such as Section 90, here under consideration, impairs freedom of speech as it does, in view of the stipulated facts before us, we have no doubt that it constitutes an invasion of constitutional guarantees, both under the State and Federal due-process of law clauses and the mandatory provision prohibiting the enactment of laws impairing the freedom of speech".

The conflict between human rights and property rights was discussed in *Ex Parte Lyons,* 81 Pac. (2nd) 192:

> "Petitioner bases his right, to peacefully picket, on the provisions of the first and fourteenth amendments to the Federal Constitution, U. S. C. A. Const. Amends. 1, 14, and on section 9 of article 1, of the state Constitution which guarantee the unrestricted right of free speech. Thus we have here a recurrence, in a somewhat novel form, of that struggle between property rights and personal rights which has occupied the attention of the courts of the land since the organization of the Republic. The courts have always been zealous to protect the rights of persons to acquire, own and enjoy property. They have been more zealous, if possible, to protect the personal right of free speech and perhaps justly so, for free discussion contains the germ of progress which keeps flowing the blood stream of the Republic."

Since the filing of this petition, this Court, through Mr. Justice Roberts, delivered an opinion, on November 22nd, 1939:

> In Re: *Clara Schneider* v. *The Town of Irvington;*
> *Tim Young* v. *California;*
> *Snyder* v. *Milwaukee;*
> *Nichols et al.* v. *Massachusetts.*

These cases appeared as numbers 11, 13, 18, and 29, of the present term docket, and were considered together. These

cases are too fresh in the minds of the court to require extended citation.

These were all cases involving freedom of the press; yet the Court said in its opinion:

> "The freedom of *speech* and of press secured by the First Amendment against abridgement by the United States is similarly secured to all persons by the XIVth Amendment against abridgement by a State".

This statement of Mr. Justice Roberts emphasizes the equal sacredness of freedom of speech and of freedom of press. In *Snyder* v. *Milwaukee, supra,* No. 18, the Court states the facts to be this,

> "The petitioner, who was acting as a picket, stood in the street, in front of a meat market, and distributed to passing pedestrians hand-bills which pertained to a labor dispute with the meat market, and asking citizens to refrain from patronizing it".

In the case at bar, the petitioner merely stood at the entrance of an industrial plant, and orally requested a fellow employee to refrain from accepting reemployment during a strike. If the Court held in the *Snyder* Case, *supra,* that it was not within the police power of the State to limit freedom of *press,* even in an industrial dispute, it must necessarily follow that it is not within the police power of the state to limit freedom of *speech* in an industrial dispute, and therefore the conviction of the petitioner was wrongful. It is further significant that each of the above statutes and ordinances were declared unconstitutional. A clever attempt was made by the legislative authority to conceal the real purpose for which the legislation was enacted, and to insert into each of these pieces of legislation some clause, or catch phrase, on which they might be held constitutional. This Court, in each case, removed the tinsel and condemned the bad apple hidden underneath.

This Court further said in these cases:

"In every case, therefore, where legislative abridgement of the right is asserted, the Court must be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

"This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties."

This Court recently said in the case of *C. I. O. v. Hague*, 59 S. Ct. 958.

"It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due-process clause of the Fourteenth Amendment".

Mr. Justice Butler, in his dissenting opinion in the case of *Senn v. Tile Layers Union*, 57 S. Ct. at page 867, 81 L. Ed. 1229, said:

"The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer".

Yet the Alabama Court, in the *Hardie-Tynes* case, 66 So. at 657, *supra*, as previously pointed out, said:

"Perhaps our Legislature has taken the view, adopted by some of the Courts, that in actual practice

> there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statute",

If that is the "effect of the statute" then it must fall. By the express statement of the prosecuting witness in the case at bar, the petitioner's actions were entirely peaceful. There was probably never a "peaceful election", yet it would be absurd to argue that simply because elections are not peaceful that the right of citizens to discuss them is not protected by the guarantee of freedom of speech; and that the State under the guise of its police power can restrict a citizen's right to discuss or hold elections.

In the case of *Herndon* v. *Lowry*, 301 U. S. 242, this Court said,

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the principle of the Constitution".

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

There is certainly no question involved in this case of the safety of the State. But the right here sought to be

protected by the Legislature is the employer's right to maintain the *status quo* without interference by his employees. For the Alabama courts to hold that one American workman cannot freely speak his sentiments to another American workman, concerning their mutual working conditions, is to indoctrinate our law with a philosophy foreign to English speaking people, and strike down the fundamental guarantees they have won in their Bill of Rights.

The court of Alabama, in the case of *Hardie-Tynes* v. *Cruise, supra,* further said in discussing picketing:

> "The 'liberty' guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is the tritest truism to say that every man must renounce unbridled license".

To hold that peaceful discussion of working conditions is, "unbridled license", is to stretch the imagination beyond the breaking point. The rights of peaceful assembly and freedom of speech, are sacred rights wrung from despotic sovereigns, intent, on exercising "unbridled license" in the government of their subjects.

The Alabama court further said in the *Hardie-Tynes* case, *supra,*

> "If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of the other to pursue his business unmolested?"

The petitioner confesses that he knows of no constitutional right that the employer has to "pursue his business unmolested", especially a right to pursue that business unmolested by reasonable, and peaceful argument, on the part of his employees, for humane treatment and a decent standard of living. As to this argument Colorado said in the case of *People* v. *Harris, supra,*

> "The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is damnum absque injuria".

Recently, the case of *City of Reno* v. *The Second Judicial District Court of the State of Nevada* was decided by the Supreme Court of the State of Nevada. (Not yet printed in the advance sheets.) Our labors have been very much lightened by the completeness of this decision and its exhaustive citations of all relevant authority. We have, therefore, printed it in full at the end of this brief, and we respectfully refer the Court to the same.

POINT II

The Petitioner's Conviction Was Without Due-Process of Law in Violation of His Right of Freedom of Speech

The Court of Appeals of Alabama in its opinion in this case (R. 20) said:

> "The evidence adduced upon the trial was sufficient to bring the appellants actions, for which he was being prosecuted, within the purview of the prohibition implied in the statute."

Are citizens to be convicted for the violation of prohibitions that are merely "implied in the statute"? If so, clearly, the courts are exercising arbitrary authority in violation of the due-process of law clause of the *XIVth. Amendment.*

The criminal misconduct for which the petitioner was convicted consisted of requesting his fellow worker not to return to work until a strike was settled. Certainly there is nothing in the petitioner's action here to justify a reasonable apprehension of danger to the organized government of the State so as to admit an abridgment of freedom of speech. In *De Jonge* v. *Oregon*, 299 U. S. 363, the Chief

Justice in speaking of the Legislature's right to abridge freedom of speech and assembly said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

It is well settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon* v. *Lowry, supra.* An examination of the facts in this case and the case of *O'Rourke* v. *City of Birmingham, supra,* will show that this statute is being ruthlessly applied in Alabama to protect the economic interest of the employer against the human rights of the worker. It is regrettable that the published opinions do not contain more instances of the manner in which the statute is applied. In the vast majority of these "applications" the prisoner is unable to appeal.

Freedom of speech is a part of the political inheritance which Americans derived from the mother country; it is our birthright and it is the duty of the State to which we have delegated the right to govern us, to protect and enforce it; but only through stubborn resistance to the exer-

cise of arbitrary power will it be preserved to us. The fact that picketing is distasteful to a group of legislators should not be warrant to them, under pretext of exercising the police power to preserve order, to abridge freedom of speech.

A mere threat of disorder cannot be seized upon as valid excuse for abridging the fundamental guarantees of the Bill of Rights. As Mr. Justice Brandeis said of the generation that included those who inserted these guarantees into the Constitution:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. Whitney *v.* California, 274 U. S. 357, at 377."

The State's Defense

The State's defense of its statute here challenged, as appears from its brief filed in opposition to the petition for certiorari, seems to be entirely one of technical evasion. If the Attorney General of Alabama had desired not to meet the merits of this case, he might well have done as the Attorney General of Colorado did in the case of *Peoples* v. *Harris, supra.* It will be noted in the opinion in this case on page 990, paragraph 5:

> "The position of the people is supported here by Amicus Curiae, while the Attorney General joins with counsel for defendant urging the invalidity of the statute".

Without attempting to defend the merits of the statute, the Attorney General put forward in his brief the two following arguments:

A. That the Federal question was not properly raised.

B. That the case presented to the Court was not one of peaceful picketing.

These two points will be dealt with briefly.

A. An examination of the Record (R. 4) will show that, to the affidavit and warrant filed in the Inferior Court of Tuscaloosa County, the petitioner filed the following demurrers:

> "5. That the statute which the defendant is charged with violating in said complaint is repugnant to the XIVth Amendment of the Constitution of the United States."
>
> "6. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it refuses him the right of peaceful assemblage as guaranteed by Constitution of the United States."
>
> "7. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it contravenes the defendant's right of freedom of speech."

And in the Circuit Court of Tuscaloosa County, Alabama, the above three demurrers, 5, 6, and 7, were refiled to the complaint of the State (R. 7). Further, in the Circuit Court, the constitutionality of the statute was again raised on motion to exclude the State's evidence (R. 13).

The Court of Appeals of Alabama, in its opinion affirming the conviction of the petitioner in the Circuit Court, said:

> "so, as conceded by able counsel here representing appellant, 'the one question involved in this appeal is the constitutionality vel non of Section 3448 of the Code of Alabama, 1923'".

The Court of Appeals then further said, that it must affirm the conviction on the authority of *O'Rourke* v. *The City of Birmingham*, 27 Ala. Ap. 133, 168 So. 206, certiorari denied 232 Ala. 355, 168 So. 209; and *Hardie-Tynes Manufacturing Company* v. *Cruise et al.*, 189 Ala. 66, 66 So. 657. It will

further be noted in the *O'Rourke* Case on rehearing the Court said:

> "This Court having no inclination to deprive the appellant of any legal right or retard in any manner his full right of review of every pertinent question involved, therefore grants the request aforesaid and holds directly which is already in said opinion been impliedly held, from the authorities cited, by which we are governed and controlled, that in over-ruling the demurrers to the complaint in this cause, the application of the provisions of *Chapter 91 of the Code of Alabama, 1923*, the trial Court acted without error, *168 So. 206, 27 Ala. App. 133.* We are of the opinion that the ruling complained of had no tendency to deprive the appellant of his rights, powers, privileges and immunities as secured and guaranteed to him by the provisions of the *XIVth Amendment to the Constitution of the United States.*"

It is difficult to conceive of a more definite adjudication of the Federal question involved in the case at bar than the foregoing statement in its parent *O'Rourke* Case. The only merit in the State's argument in this particular seems to be the conjecture that the Court of Appeals might have overlooked the opinion on rehearing in the *O'Rourke* Case in deciding the case at bar.

The State further takes the highly technical position that, as certiorari was denied in the *O'Rourke* Case as well as in the case at bar, it was not a decision of "*the highest Court of the State*". However, the jurisdictional statute, here relied on, does not require a decision by "*the highest Court of the State*" but merely by the *highest Court of a State in which a decision could be had.* The Court of Appeals of Alabama is the *highest Court of the State of Alabama in which a decision could be had* as a matter of right. The granting of Certiorari by the Supreme Court of Alabama is a matter of grace.

While it would not be necessary to give this Court jurisdiction of this proceeding, the petitioner prayed a Writ of Certiorari of the Supreme Court of Alabama, in which petition he assigned as error:

> "5. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the XIVth Amendment of the Constitution of the United States."
>
> "8. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the Constitution of the United States."

It should further be noted that, under the jurisdictional statute here relied on, it is not necessary that the *"highest Court of a State in which a decision could be had"* 'decide', on the face of its opinion, the Federal question, but merely that the Federal issue be *drawn in question.*

B. The next technical safeguard by which the State attempts to protect its statute is the argument that the facts at bar do not constitute a case of peaceful picketing, and that there was implied intimidation in this case. The record completely negatives such contention. Quoting from the record (R. 10):

> "neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceable manner, and did not put me in fear; he did not appear to be mad."

The State's witness, J. M. Waldon, further testified (R. 12):

> "at the time Mr. Thornhill and Clarence Simpson were talking to each other there was no one else present, and I heard no harsh words, saw nothing threatening in the manner of either man."

The implication of the Attorney General's argument is that Mr. Simpson should have been afraid of Mr. Thornhill, be-

cause Mr. Thornhill was a union man and Mr. Simpson was not. Simpson and Waldon were the only two witnesses called by the State. The proposition of law, that a party calling a witness is bound by the testimony of that witness, is too well established to require citation of authority. We are confronted with the situation of the two State witnesses testifying that Mr. Thornhill's actions on the occasion in question were entirely peaceful; the argument of the Attorney General, that it could not possibly have been peaceful since Mr. Thornhill was a "picket", and that the word "picket" is borrowed from the nomenclature of warfare. (Brief in opposition to petition, page 18.)

As was said in the case of *George B. Wallace Company* v. *International Association*, 155 Or. 652, 63 Pac. (2d) 1080:

> "It is urged here, and some courts have held (as did the Alabama Court in the *Hardie-Tynes* Case, *supra*) that there can be no such thing as peaceful picketing but picketing is per se a species of coercion and intimidation. That doctrine has long since been discarded."

We need go no further than to cite *Senn* v. *Tile Layers' Union*, 301 U. S. 468, wherein Justice Brandeis, speaking for the Court, said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.
>
> . . . . . .
>
> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare Pennsylvania Railroad Co. *v.* United Railroad Labor Board, 261 U. S. 72. It is true,

also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

Statute Violates Established Rules Requiring Certainty of Specification of Charge

In addition to the inherent viciousness of the statute and its tendency to strip the petitioner of his constitutional guarantees, we think the statute violates all the established rules of certainty of specification of charge and standard of guilt. In affirming the petitioner's conviction by the trial court (R. 20), the Court of Appeals of Alabama said that the petitioner's actions were "within the purview of the prohibition implied in the statute". One of the fundamental principles of English-speaking justice is that a person charged with crime shall be informed of the charge against which he is called upon to defend, and the crime must be defined with certainty in order that citizens may gauge the effect of their conduct in advance of their actions. Only those acts which are stated with certainty by the legislative authority to be criminally reprehensible can carry criminal responsibility. There is no implied crime; criminal statutes must definitely define acts which amount to criminal conduct.

On this aspect of the statute the Colorado Court said, in speaking of their own Anti-Picketing Law, in *Peoples* v. *Harris, supra*:

"The constitutionality of section 90, *supra*, also is challenged on the ground of uncertainty, in that there is a failure to sufficiently define standards of guilt to meet constitutional requirements. See *United States* v. *Reese*, 92 U. S. 214, 219, 220, 23 L. Ed. 563; *United States* v. *Brewer*, 139 U. S. 278, 288, 11 S. Ct. 538, 35 L. Ed. 190; *Todd* v. *United States*, 158 U. S. 278,

282, 15 S. Ct. 889, 39 L. Ed. 982; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Herndon* v. *Lowry*, 301 U. S. 242, 263, 57 S. Ct. 732, 81 L. Ed. 1066; *Lanzetta* v. *State*, 59 S. Ct. 618, 82 L. Ed. —; *People* v. *Mooney*, 87 Colo. 567, 290 P. 271. There is merit in this contention, but, in view of the conclusions reached, we deem it unnecessary to decide that and other questions raised."

Conclusion

The Supreme Court of Alabama said in *Hardie-Tynes* v. *Cruise*, *supra*, one of the cases on authority of which the Court of Appeals of Alabama upheld the petitioner's conviction;

> "Perhaps our Legislature has taken the view adopted by some of the courts that in actual practice there can be no such thing as peaceful picketing, or peaceful persuasion. Certainly this is the effect of our statute."

From the above statement and the Court's action in the present case, there can be no doubt that the Alabama Courts have adopted the credo of the intrenched reactionary forces who have continually maintained and constantly urged the superiority of property rights over human rights. The dislike of any movement which tends to disturb the status quo is probably best expressed by the hysterical statement in *Moore* v. *Union*, 402, 179 Pa. 417; and *Atcheson, T. S. F. Ry. Co.* v. *Gee et al.*, 139 Fed. 582 (1905).

> "There can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing, or lawful lynching."

Those who would strip the people of their constitutional liberties, in order to protect their vested property interests, might well harken to the warning set out in *Ex Parte Lyons*, 81 Pac. (2nd) at 197:

> "In a Republic it is necessary that the right of freedom of speech and freedom of press be zealously guarded by the Court. These rights form the life stream of liberty. History teaches us that when these rights are suspended the right to possess and enjoy private property rapidly vanishes."

We have undertaken to show that the Alabama Legislature, in forbidding peaceful picketing, has violated one of the most necessary and sacred of American rights—the right of freedom of speech.

The construction placed upon the statute by the Alabama courts is such as to deny workers the right to peaceably assemble and peaceably discuss their working conditions with their fellow workers in the vicinity of their employer's plant.

The petitioner submits that the relief prayed should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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Counsel for Petitioner.

JOSEPH A. PADWAY,
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APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 3245

CITY OF RENO, a Municipal Corporation, *Petitioner*,

vs.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, WILLIAM McKNIGHT, Judge of Said Court, and CHARLES REEL and ALVIN RAE, *Respondents*

Douglas A. Busey, Attorney for Petitioner, City of Reno.
Lloyd V. Smith, Attorney for Respondents.

Opinion

By the Court, DUCKER, J.:

This is an original proceeding in certiorari to review a judgment of the Second Judicial District Court.

Charles Reel and Alvin Rae, who will be hereinafter referred to as respondents, were complained against in the municipal court of the City of Reno, for a violation of its Ordinance No. 480. The complaint alleged that on the 29th day of June, 1937, at Reno, in the County of Washoe, State of Nevada, they "did watch, beset, and picket the premises of Berg & Hansen, Inc., a Nevada Corporation, said premises being situated at 315 East Street in said city, county and state, and the approaches thereto, for the purpose of inducing others to refrain from entering such premises, and from patronizing, transacting business with and negotiating with the said owner, Berg & Hansen, Inc., and Lindley & Co., occupant of such premises."

In a second count it was alleged: "That at said time and place the said defendants, in association and agreement with Charles Rowan, H. A. Anderson, and John Ferrari, did assemble, congregate and meet together in the vicinity of the premises being situated at 315 East Street in said city,

county and state, and upon the streets, approaches, and places adjacent thereto, for the purpose of inducing others to refrain from entering such premises and from patronizing, transacting business with and negotiating with the said owner thereof, Berg & Hansen, Inc., and Lindley & Co., occupant of such premises."

Ordinance 480, omitting title reads:

"Section 1. Whoever shall watch, beset or picket the premises of another, where any person is employed, or any approach thereto, or any place or approach thereto, where such employee lodges or resides, for the purpose of inducing any such employee, by compulsion, threats, coercion, intimidation, or by any act of violence, or by putting such employee in fear, to quit his or her employment or to refrain from seeking or freely entering into employment, shall, upon conviction thereof, be fined in any sum not less than Ten Dollars, ($10.00), nor more than Three Hundred ($300.00) Dollars to which may be added imprisonment not exceeding sixty (60) days in the City Jail.

Section 2. Whoever shall watch, beset or picket the premises of another, or any approach thereto for the purpose of inducing others to refrain from entering such premises, or from patronizing, transacting business with or negotiating with the owner or occupant of such premises, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars, to which may be added imprisonment not exceeding sixty (60) days in the City Jail.

Section 3. Whoever, in association or agreement with one or more persons, shall assemble, congregate or meet together in the vicinity of any premises where other persons are employed, or upon the streets, approaches or places adjacent thereto, for the purpose of inducing any such employee, by compulsion, threats, coercion, intimidation or by any act of violence, or by putting such employee in fear, to quit his or her employment therein or to refrain from seeing (seeking) or freely entering

into employment therein, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars, to which may be added imprisonment not exceeding sixty (60) days in the City Jail.

Section 4. Whoever, in association or agreement with one or more persons, shall assemble, congregate, or meet together in the vicinity of the premises of another, or upon the streets, approaches, or places adjacent thereto, for the purpose of inducing others to refrain from entering such premises or from patronizing, transacting business with or negotiating with the owner thereof, of such premises, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars to which may be added imprisonment not exceeding sixty (60) days, in the City Jail.

Section 5. Whoever, for the purpose of compelling, coercing or inducing any persons to quit his or her employment, or to refrain from seeking or freely entering into employment, shall utter to or within the hearing of such person or persons, any derogatory or opprobrious or indecent epithets or language or gestures or threats of violence, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars, to which may be added imprisonment not exceeding sixty (60) days in the City Jail. * * *"

The remaining part of the Ordinance is not involved.

The respondents were tried and found guilty in the municipal court and a fine of $10.00 was assessed to each. They appealed to said district court and the case was submitted upon an agreed statement of facts. The district court held the ordinance unconstitutional and set aside the judgment of the municipal court. The facts stipulated upon which the case was submitted in the district court are as follows:

"IT IS HEREBY STIPULATED by and between the respective parties hereto, acting by and through

their attorneys, that the facts upon which the above-entitled criminal action is hereby submitted to the Court for its decisions, are as follows:

That Berg & Hansen, Inc., is a Nevada Corporation and is the owner of the premises situated at 315 East Street, in Reno, Washoe County, Nevada. That Lindley & Co. is the occupant of said premises. That a large warehouse is situated on the premises and Lindley & Co., conducts a wholesale grocery business at said warehouse; that at least 90% of the merchandise handled by the said Lindley & Co. is purchased outside of the State of Nevada and thereafter brought into Nevada for resale, and that a portion of the merchandise sold by the said Lindley & Co. is sold outside of the State of Nevada. That said warehouse has four large doors in its front on East Street which doors constitute the business entrance to the warehouse and the principal approaches to the warehouse from East Street run to these doors. That groceries and supplies in truck loads are unloaded and loaded at these doors and the trucks engaged in such unloading and loading use the aforesaid approaches to said doors from East Street. That many trucks load and unload at said doors and use said approaches every day and the drivers of many of said trucks are the agents of persons, and persons patronizing, transacting business with and negotiating with Lindley & Co.

That on the 29th day of June, 1937, at about the hour of 9 o'clock A. M. of said day, and for a considerable period of time thereafter, Charles Reel and Alvin Rae walked back and forth along the sidewalk and street and in front of the aforementioned approaches to the side doors, carrying banners upon each of which was written the words 'Lindley & Co., Unfair to Organized Labor.' That their purpose in doing as aforesaid was to induce any and all truck drivers and teamsters carrying groceries and supplies for Lindley & Co., to refrain from entering said premises and from patronizing, transacting and negotiating business with Lindley & Co. That at said time a large number of people gathered

and congregated about said premises. That Charles Rowan, Alvin Rae, Charles Rell, H. A. Anderson and John Ferrari were present in the vicinity of said premises at said time and met together upon East Street and upon said approaches to said premises. That their purpose in doing as aforesaid was to induce any and all truck drivers and teamsters carrying groceries or supplies for Lindley & Co., to refrain entering said premises and from patronizing, transacting business with and negotiating with Lindley & Co. That said Alvin Rae and Charles Reel did so meet and assemble at said time and said place with Charles Rowan, H. A. Anderson and John Ferrari by agreement. That at a meeting of the teamsters union shortly prior to said June 29th, 1937, said teamsters union by a unanimous vote, instructed defendants, Charles Reel and Alvin Rae, to picket said premises and approaches, at which meeting H. A. Anderson, John Ferrari and Charles Rowan were present and at which meeting said Charles Reel and Alvin Rae agreed with H. A. Anderson, John Ferrari and Charles Rowan to assemble and meet together in the vicinity of said premises for said purpose aforesaid.

That said Alvin Rae and Charles Reel at said time and place did not make any overt or actual threats and committed no acts constituting overt or actual intimidation, coercion or violence.

That during all of the time herein mentioned and at said time and place, the employees of Lindley & Co. were not members of any labor unions and were not members of the Teamsters Union. That Charles Reel, Alvin Rae, Charles Rowan, H. A. Anderson and John Ferrari were not, at any time herein mentioned, and at said time and place aforesaid, employees of Lindley & Co.

That said acts aforesaid resulted from the refusal of Lindley & Co. to sign an agreement that Lindley & Co. would employ as teamsters only members of said union, or retain as teamsters only those of its employees willing to become members of said union. That the aforesaid agreement contained a schedule of union hours and wages. • • •"

It was also stipulated that said ordinance of the City of Reno, was adopted from an ordinance of the City of Indianapolis, Indiana.

Petitioner contends that the ordinance is in all respects constitutional and valid and that the district court, in declaring it unconstitutional, acted in excess of jurisdiction.

A preliminary question was raised as to whether the judgment of the district court is reviewable by certiorari. I am of the opinion that it is. Chapman v. District Court, 29 Nev. 154.

It is alleged in the petition that the district court made no ruling, judgment or decision based upon the merits of, or facts involved in said matter, but that said decision rested and was based solely upon the finding of the court that said ordinance was unconstitutional and void. As the record before us discloses this to be true the agreed statement of facts will be laid out of consideration, the question before us being whether the ordinance, as a matter of law, is constitutional. Section 2 and 4 of said ordinance which respondents were charged with violating prohibit picketing in any form. Respondents contend that the ordinance which forbids such picketing is unconstitutional and void because:

1. It infringes upon the right of personal liberty as guaranteed by our state and federal constitutions.

2. It is an unreasonable and oppressive restriction of freedom of speech.

3. It restricts the right freely to assemble.

I am of the opinion that peaceful picketing is a lawful means of labor union activity. This conclusion is induced from the fact, as I understand it, that in peaceful picketing there is an entire absence of fraud, violence, or anything of an intimidating nature. It is characterized by peaceful persuasion for the promotion of a lawful purpose.

The conviction that peaceful picketing for such a purpose is lawful, is strengthened in my mind by the further fact that its lawfulness is sustained by the great weight of modern authority. People v. Harris, 91 Pac. (2nd) 989 (Colo.), and cases cited in that opinion. In addition many

other cases might be cited to that effect. Among these are: Empire Theatre Co. v. Coke, et al., 53 Mont. 183; The Citizens Co. v. Ashville Typo Union, 187 N. C. 42; Goldfield Cons. Mines Co. v. Goldfield Miners Union, 159 Fed. 500 (C. C. A.); Lisse v. Local Union No. 31, 2 Cal. (2nd) 312; Ex Parte Lyons, 81 Pac. (2nd) 190.

Following the case of Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, cited in People v. Harris, supra, the Court of Appeals in Busch Jewelry Co. Inc. et al., v. United Retail Employees Union, Local 830, et al., 22 N. E. (2nd) 320, (N. Y.) said:

> "Organized labor has the right of free speech, peaceful picketing and collective bargaining."

The judicial notion, sometimes expressed, that there can be no such thing as peaceful picketing, is subscribed to by few courts, and repudiated by many. "The doctrine," said the court in George B. Wallace Co. v. International Ass'n., 115 Ore. 652, "that picketing is necessarily a species of coercion and intimidation, is dogma long since discarded." Goldfinger v. Feintuch, 288 N. Y. S. 855.

The proposed final draft No. 6, Restatement of Torts, Group No. 3, American Law Institute, p. 99, Section 24, contains the following concerning picketing:

> "(1) As used in this Chapter, 'fair persuasion' means argument, exhortation or entreaty addressed to a person without, (a) threat of physical harm or economic loss, or (b) persistent molestation or harassment; or (c) material and fraudulent misrepresentations."
>
> (2) Picketing at or near another's place of business for the purpose of persuading third persons, in accordance with the standards stated in subsection (1), to adopt a course of conduct towards his business is a form of fair persuasion of the third persons if access to the place of business is not materially obstructed thereby."

The foregoing paragraphs were finally adopted without change at the 1939 annual meeting of the Institute, and will appear as above quoted in the forthcoming bound volume.

In the explanatory notes to said Section 24, appearing at pp. 203-204 of said proposed Final Draft, it is said:

"The case, (peaceful picketing as a legitimate form of fair persuasion) has been strongly put in Schuster v. International Association of Machinists, 293 Ill. App. 177, 13 N. E. (2nd) 57: 'It has been repeatedly held that where an employer refuses to employ union labor, labor organizations may freely publish in their own official organs and other newspapers, in pamphlets and circulars, or by means of radio, the fact that such employer is unfair to organized labor. Then, why is it not just as lawful for a labor union to make publication of the employers' unfairness by signs carried peaceably by a member or members of the interested union in the vicinity of the place of business of the employers?

It is a matter of common knowledge that many of our well known industrialists and large employers of labor almost daily condemn in the public press the alleged iniquities of organized labor. • • • There is no legal means available to restrain such publicity. Yet when a labor union in a modest way, and utilizing perhaps the only means available which it can afford, seeks to present by signs carried on the person of one or more of its members the truth concerning an employer who refuses to recognize or deal with the union, it is strenuously urged that the employer is entitled to relief from a court of equity to prohibit the display of such signs in front of his place of business.' "

In Senn v. Tile Layers Protective Union, 222 Wis. 383, the court in holding the picketing lawful under the state statute, had this to say of the lawfulness of picketing in general:

"Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of economic coercion, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance."

It was declared in Bayonne Textile Corp. v. American Fed. of Workers, 172 Atl. 551 (N. J.):

"'Picketing is lawful if it does not have an immediate tendency to intimidation of the other party to

the controversy, or to obstruct free passage such as the streets afford, consistent with the right of others to enjoy the same privilege. * * *" Citing Keuffel & Esser v. International Ass'n. of Machinists, 93 N. J. Eq. 429; American Steel Foundaries v. Tri-City C. T. Council, 257 U. S. 184; Nann v. Raimist, 255 N. Y. 307, 75 A. L. R. 669. "The modern view," continued the court, "is that picketing is not per se unlawful, and should not be enjoined, if peaceably carried on for a lawful purpose."

In Scofes v. Helmar, 205 Ind. 596, the court said:

"It is now generally recognized that employees have a legitimate de facto interest in collective action for the purpose of improving their economic situation; and it cannot be questioned seriously that beneficial results to society, as well as to employees individually and as a class have come from an assertion of the collective economic force of employees. The law recognizes this de facto interest to the extent of an immunity from legal responsibility for financial loss to employers which results from strikes and picketing, when such strikes and picketing are conducted in a lawful manner. We may evolve eventually agencies that will adequately protect the interests which employees are now required to protect through the collective economic force but 'so long as the economic order is grounded upon a premise of strife between producer and consumer, between labor and capital, the battle should not be rendered one-sided by perpetuating the advantage which society, combined in the guise of capital, enjoys as a result of an accidental oversupply of labor when the power to influence public opinion is denied workmen.'"

In George B. Wallace Co. v. International Ass'n. of Machanics, 155 Ore. 652, the court said:

"The great majority of courts, including the United States Supreme Court (American Steel Foundries v. Tri-Cities Central Trades Council, 257 U. S. 184, 66 L. Ed. 189, 42 S. Ct. 72, 27 A. L. R. 360), however,

sustain the right of peaceful picketing. * * * This court has long recognized the right of peaceful picketing when done for a lawful purpose. * * * The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is damnum absque injuria."

The lawfulness of peaceful picketing was declared in Clark Lunch Co. v. Cleveland Waiters & Beverage Dispensers Local 106, et al., 154 N. E. 362 (Oh.). In the course of its opinion the court said:

"The plaintiff having determined to operate its business as a nonunion concern, and having refused to employ union labor, may not reasonably expect, nor has it the right to expect the latter's business and support; and, furthermore it has no legal right to prevent a lawful publicity of its actions in this behalf by union labor. It necessarily follows that if plaintiff has a legal grievance in this case, it rests only in the method and manner of distribution of the cards aforesaid. The La France case, supra, and the McCormick case, supra, clearly define the line of demarcation between what is lawful and what is not lawful in this respect. If the methods adopted do not intimidate or coerce, and are without violence, they are lawful. When they involve abuse, violence, intimidation, or coercion, they are unlawful. * * * It is shown that the acts complained of are causing the plaintiff a substantial loss in its business and profits. This fact furnishes no basis for judicial interference, for the plaintiff had no vested property right in the business so lost to it. This is so for the reason that, while it had a legal right to determine its course of action, it must be held to have considered in that connection the influence of union labor on the public, and the benefit of its support and patronage. These are factors in the situation it was bound to consider. It chose to reject union labor and to employ non union labor at lower wages and longer hours of service. It was bound to know that it could not legally prevent publicity in respect to its action.

> Whatever financial loss it now suffers is therefore due to causes of its own making, and within its control, which it must be held to have anticipated."

The foregoing expressions are fairly typical of the great weight of judicial opinion that peaceful picketing is lawful.

While the net result of better reasoned judicial opinion is to that effect, it is universally held that if picketing goes beyond the allowable area of peaceful persuasion and assumes the form of intimidation, threats of violence, or impedes traffic, or interferes with the free use of property, or involves trespass or fraud, it is unlawful.

Petitioner contends that as the ordinance before us, as adopted, is the ordinance of the City of Indianapolis, the decision in Thomas v. Indianapolis, 145 N. E. 550, prior to its adoption here, that it is constitutional, must be the construction given it by this court.

We are referred to several decisions of this court in support of the position. These decisions adhere to the rule that where a statute has received a judicial construction and is afterwards adopted by another state it will be presumed to have been enacted with that construction placed upon it. The presumption is not conclusive; it is however, very persuasive. Menteberry v. Giacometto, 51 Nev. 7. But the rule has no application here. The argument in support of it presumes a doctrine which, if allowed, would substitute the Supreme Court of Indiana as a tribunal to determine the grave question of whether the ordinance before us transgresses the Constitution of Nevada, in the place of the Supreme Court of this state.

Counsel confuses construction, that is, the function of a court to ascertain the scope and meaning of a statute with the duty of determining its validity when laid along side of constitutional guaranties. The rule contended for is applicable only in a case of construction. 14 Am. Juris. 300; Williams v. State, 81 N. H. 341, 125 A. 661, 38 A. L. R. 490; Boyd v. C. L. Ritter Lumber Co., 89 S. E. 273.

The contention made by petitioner's counsel was disposed of in Boyd v. C. L. Ritter Lumber Co., supra, in the following explicit language:

"The statute under which this proceeding is had was taken, it seems, from a statute of the State of Kentucky, which was held constitutional and valid by the Court of Appeals of that state prior to the passage of the act under consideration, namely, Chesapeake Stone Co. v. Moreland, (Ky.) 104 S. W. 762, 16 L. R. A. (N.S.) 479; and it is insisted here for the defendant in error that when a constitutional provision is ordained, or a statute enacted by another state, and it is ingrafted into the Constitution or statutes of this state, and prior thereto such constitutional provision or statute had received judicial construction by the courts of such other state, then it is to be presumed that the lawmaking power of this state intended that the constitutional provision or statute should be given the same construction in this state that it was given in the state from which it was taken. This principle of construction, however, applies only to the construction of constitutional provisions and statutes, and has no relation, as the authorities hold, to the question of whether or not a statute is constitutional and valid. In other words, the Legislature, by enacting a statute which has been held constitutional and valid by the courts of another state, cannot deprive the courts of this state of the right to determine for themselves the question of the constitutionality of such statute."

It may be conceded in conformity with counsel's contention that the City Council of Reno in adopting the Indianapolis ordinance as its own intended to adopt it with the stamp of approval by the Indiana Supreme Court and intended it to be constitutional. But whether it is so in fact is properly the subject of determination by the courts of this state.

Sections 2 and 4 of the ordinance do not seek to merely regulate picketing, as by limiting the number of pickets, specifying the number of paces they must be separated from each other, requiring them to remain on the outer half or other fractional part of the sidewalk, limiting the size of the banner which may be carried, forbidding picketing under circumstances claimed to be unlawful, tortious, or

inequitable, or containing other regulations designed to reasonably control picketing. They go beyond regulation. They are a sweeping prohibition of any form of picketing, irrespective of its nature, purpose or number of pickets, and constitute an interdiction of all activities and free speech sought to be exercised in the form of peaceful picketing. The federal constitution guarantees freedom of speech. In the Fourteenth Amendment it is declared: "nor shall any state deprive any person of life, liberty or property without due process of law." The due process clause in the Fourteenth Amendment is a prototype of the due process clause in our Constitution. Art. 1, Section 8. In Art. 1, Section 9, it provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Notwithstanding these guaranties, the exercise of these rights is not absolute. They may be regulated under the police power of the state. Liberty regulated by law is a fundamental of our democratic government. However, neither freedom of speech nor liberty of action may be suppressed under the guise of regulation. They are not subject to the exercise of arbitrary power. Any annoyance or loss of business caused to an employer by lawful picketing does not warrant the exercise of the police power of the state. By the weight of authority loss of business to an employer in such an economic contest is damnum absque injuria. George B. Wallace Co. v. International Ass'n. supra; People v. Harris, supra; Exchange Bakery & Restaurant v. Rifkin, supra; Senn v. Tile Layers Union, 301 U. S. 468.

In the New York case it was held: "Resulting injury is incidental and must be endured."

In Senn v. Tile Layers Union, it was said:

> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn (employer), even if the method and means employed in giving publicity (picketing) are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, if not an invasion of the liberty

guaranteed by the Constitution. (Citation). It is true, also that disclosures of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

While such annoyance or such loss does not warrant the exercise of the police power of the state, it is well settled that such inherent power is not available for the protection of an individual or class of individuals, but for the protection of the community. It may not be exercised for private purposes.

As stated by Judge Farrington, speaking for the Court in Goldfield Cons. Mines Co. v. Goldfield M. U. No. 220, 159 Fed. 500:

> "It is too clear to require a citation of authorities that the Legislature has no power to restrict the exercise of a constitutional right, unless the interests of the public, as distinguished from the interests of the individual, or of a class of individuals, demand such restraint. The act so forbidden by the Legislature must be detrimental to the public welfare, and the health, safety, or morals of the community to justify such interference."

That the city may, in the exercise of its police power, regulate the methods of publicity as well as the use of the streets, is conceded. Senn v. Tile Layers Union, 301 U. S. 468. But it cannot, under the cloak of regulation, prohibit such means or such use. It cannot make criminal an innocent act when no interference is had with public health, safety, comfort or welfare. 16 C. J. S. 564.

The theory on which it is sometimes said that the government, either by the legislature or a municipality, may enact valid legislation against all picketing, is that this means of publicity, however it may be confined to peaceful persuasion, tends to provoke disorder and impedes traffic. On this account it is declared the exercise of the police power is justified to suppress it. I cannot agree with the idea

that peaceful persuasion in the form of picketing has any such tendency. As said in Exchange Bakery & Restaurant v. Rifkin, supra: such "picketing connotes no evil." The doctrine that it does connote such evil consequences as disorder or street obstruction, as previously pointed out, has long since been discarded.

"In practice," says the writer on the Constitutionality of anti-picketing ordinances in the Yale Law Journal, Volume 48, page 314, "dangers to the public peace arising from picketing activities can be adequately controlled by an effective police administration."

In Hague v. Committee for Industrial Organization, 83 L. Ed. 928, Mr. Justice Roberts wrote:

> "It (the ordinance involved) does not make comfort or convenience in the use of the streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. *But uncontrolled* official suppression of the privilege *cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.*" (The italic is mine.)

I may also add that the prohibition of personal liberty cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. Moreover, the contention that the suppression of peaceful picketing is necessary because its tendency is to incite disturbances and obstruct the free use of the streets, and is therefore inimical to the public welfare, is not a very flattering commentary on the efficiency of the police system of a city; for picketing assignments are ordinarily carried out in quarters under police supervision, and not in isolated places.

It is largely upon the false premise, as I see it, that peaceful picketing had a tendency "to give rise to contentions and

argument that often result in bloodshed and riot," that the court in Thomas v. Indianapolis, supra, held that the ordinance in question here was a reasonable exertion of the police power and therefore free from the objection that it violated constitutional guaranties of personal liberty. For this reason it lends no strength to the presumption in favor of the constitutionality of the ordinance.

The case of Hardie-Tynes Mfg. Co. v. Cruise, et al., 189 Ala. 66, also relied on by petitioner, inclines to the same doctrine. Besides the constitutional feature was not much urged upon the court, as appears from the following statement:

> "It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none."

Pierce v. Stablemen's Union, Local No. 8760, 103 Pac. 324; (Cal.); Moore, et al., v. Cook's and Waiter's Union, 179 Pac. 417 (Cal.); Barnes v. Chicago Typographical Union, 83 N. E. 940 (Ill.); Ex Parte Stout, 82 Tex. Crim. Rep. 183, L. R. A. 1918C, 198 S. W. 967; St. Germain v. Bakery & Confectionery W. Union, 166 Pac. 667 (Wash.), are also cited by petitioner. It is to be observed, that since the decisions above noted were rendered there has been considerable change in the legislative and judicial viewpoint as to labor controversies. As stated in Local Union No. 26, N. S. O. P. v. Kokomo (Ind.), 5 N. E. (2nd) 624:

> "Formerly the courts were inclined to disapprove collective bargaining, striking, and picketing. However, the past few years have witnessed a decided change in public opinion, legislative enactments and judicial construction."

This lately prevalent trend of legislative and judicial treatment in labor disputes is noted in Columbia Law Review, Vol. 48, and in the same article, at pages 1527 and 1528,

the case of labor's right to picket, free from governmental restraint is strongly stated as follows:

> "Although it is exceedingly difficult to extract from the cases a standard for predicting the fate of regulations yet to be tested, it is most desirable that the nature of the right to picket be clearly defined. Fortunately, such a crystallization has begun. In Senn v. Tile Layers' Union, the United States Supreme Court for the first time identified the right to picket with the right of free speech. Mr. Justice Brandies wrote for the majority in that case: 'Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. * * * In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press.' Early this year (1938) the Supreme Court also emphatically denied the authority of a municipality to limit freedom of speech by restricting the right to distribute leaflets. (Lovell v. City of Griffin, 303 U. S. 444.) It is plain that picketing and leaflet distribution raise highly similar municipal problems. Both involve the possibility of impeding traffic and both involve considerations as to the propriety of using the streets for the purpose of presenting to the public one's point of view. These recent cases lend substance to the hope that picketing is to be afforded the protection of the Fourteenth Amendment in a manner paralleling the guarantee of the right to distribute leaflets."

Freedom of the press and freedom of speech are the same, being distinguished only in the form of utterance, 16 C. J. 628.

Long since the rendition of any of the decisions heretofore mentioned on which petitioner relies, including Thomas v. Indianapolis, supra, the Supreme Court of the United States, in May, 1937 identified the right to picket with the

right of free speech. Two years after the United States Court announced that doctrine, the Supreme Court of Colorado, in the case of People v. Harris, 91 Pac. (2nd) 989, declared unconstitutional and void a statute of that state forbidding peaceful picketing. The attorney general of that state joined with counsel for the defendant in urging the invalidity of the statute. It is to be noted also that the court pointed out that Alabama was the only other state out of the forty-eight states in the Union that had a similiar statute.

In the Colorado case the defendant, Harris, was charged in the lower court with violating the anti-picketing statute. He pleaded not guilty, waived a jury trial and the case was submitted on a stipulation of facts. He was adjudged not guilty and discharged. The case came before the supreme court on a writ of error sued out by the people. There, as here, the court was confronted with a provision of criminal law which did not regulate, but prohibited peaceful picketing. The facts stipulated revealed that such was the nature of the picketing. The court cited many authorities to show that the lawfulness of such picketing was sustained by the great weight thereof. In this connection the Court said:

> "No legal injury of any kind resulted to any person because of his picketing activities. That the employer has the right to refuse to pay union wages and maintain union standards is conceded. Correspondingly, labor has the right to decline to carry on any business relation with such an employer. Any loss which occurs in such economic controversies is damnum absque injuria."

It also said:

> "It is contended that section 90, supra, (the statute outlawed) is valid as a reasonable exercise of the police power. If this section, instead of prohibiting peaceful picketing, could be so construed as to be only a reasonable regulation thereof, the contention would be sound; but it prohibits all peaceful picketing. Any legislative exercise under the police power which violates any right guaranteed by the national or state Constitutions

is invalid. In re Morgan, 20 Colo. 415; 58 P. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269; Lovell v. City of Griffin, supra, 12 C. J. 938, 939. 'Freedom is the general rule, and restraint the exception.' Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 534, 43 S. Ct. 630, 632, 67 L. Ed. 1103, 27 A. L. R. 1280. It cannot be successfully maintained that guaranties of freedom of speech are less important than guaranties relating to property."

The court finally concluded:

"Whatever our individual views may be on economic controversies, such as are involved here, we cannot consent to legislative invasion of constitutional guaranties to the extent for which contention is made in this case. The line of demarkation between police power and constitutional guaranties is not always well defined. Where a law, such as section 90, here under consideration, impairs freedom of speech, as it does, in view of the stipulated facts before us, we have no doubt that it constitutes an invasion of constitutional guaranties, both under the state and federal due-process-of-law clauses and the mandatory provision prohibiting the enactment of laws impairing the freedom of speech.

The judgment is affirmed."

The Colorado case is squarely in point with the instant case and is buttressed with ample authority. It reflects the modern view that peaceful picketing is lawful and is immune from legislative interdiction by reason of constitutional guaranties.

In an earlier opinion, the Supreme Court of Missouri in City of St. Louis v. Gloner, 210 Mo. 502, declared void an ordinance of St. Louis which, in effect prohibited peaceful picketing. The ordinance provided in part that any person or persons "who shall lounge, stand or loaf around or about or at any street corners or other public places, in the day time or night time * * * shall be deemed guilty of a misdemeanor." The testimony disclosed that defendant was engaged in peaceful picketing. The court said:

"While the city has the undoubted right, under its charter, to regulate the use of its streets, it has no right to do so in a way that interferes with the personal liberty of the citizen as guaranteed to him by our Constitution and laws."

The court quoted approvingly the following from one of its former decisions:

"They (pickets) are free men, and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own, and they have a right to use fair persuasion to induce others to join them in their quitting."

It was finally declared:

"Our conclusion is that the ordinance is unconstitutional and invalid because it infringes upon the right of personal liberty, and is unreasonable and oppressive."

Counsel for petitioners, as well as the court, in Ex Parte Stout, supra, seeks to discount the effect of the foregoing decision because the ordinance did not in terms prohibit picketing. The distinction sought to be made is not apparent. *The court outlawed the ordinance because when applied to the facts of the case, it prohibited peaceful picketing.* Its terms embraced a prohibition of such picketing.

Counsel for petitioner also seeks to discount the case of Senn v. Tile Layers Protective Union, supra, as an authority favorable to the view that the ordinance is unconstitutional. He says: "It clearly appears from that case that the state may regulate picketing in the exercise of police power."

This may be conceded, but we have an ordinance before us which, in sections 2 and 4 thereof, does not regulate, but prohibits peaceful picketing.

In Senn v. Tile Layers Protective Union, supra, the constitutionality of state anti-injunction legislation designed to prohibit judicial interference with peaceful picketing, was declared, and the intimation that such picketing is protected

by the constitutional guaranty of free speech, is too plain to be misunderstood.

In Ex Parte Lyons, 81 Pac. (2nd) 190 (Cal), it was declared: "In this state the right to peacefully picket rests upon the constitutional guaranty of the right of free speech."

The ordinance on its fact, in sections 2 and 4 is obviously adapted to protect the employer from annoyance and incidental loss of business rather than to protect the public in maintaining its peace and the unobstructed use of the streets. But such annoyance and loss in a labor dispute are not tortious nor do they constitute an invasion of any constitutional rights. Senn v. Tile Layers Union, supra. These sections bear no reasonable and substantial relation to the promotion of the public safety, health, morals, general welfare, for which the exercise of the police power may be invoked.

I am of the opinion that sections 2 and 4 of the Reno City Ordinance No. 480 are unconstitutional and void, in that they invade the constitutional guaranties of the due process of law clauses of the federal and state constitution, and of section 9 of Article 1 of the state constitution guaranteeing free speech and forbidding the state to pass any law to restrain or abridge the liberty of speech. The other sections of the ordinance being separable are not affected by the invalidity of sections 2 and 4.

I deem it unnecessary to pass on the other objections of respondents to the ordinance.

As Chief Justice Taber concurs in these views:

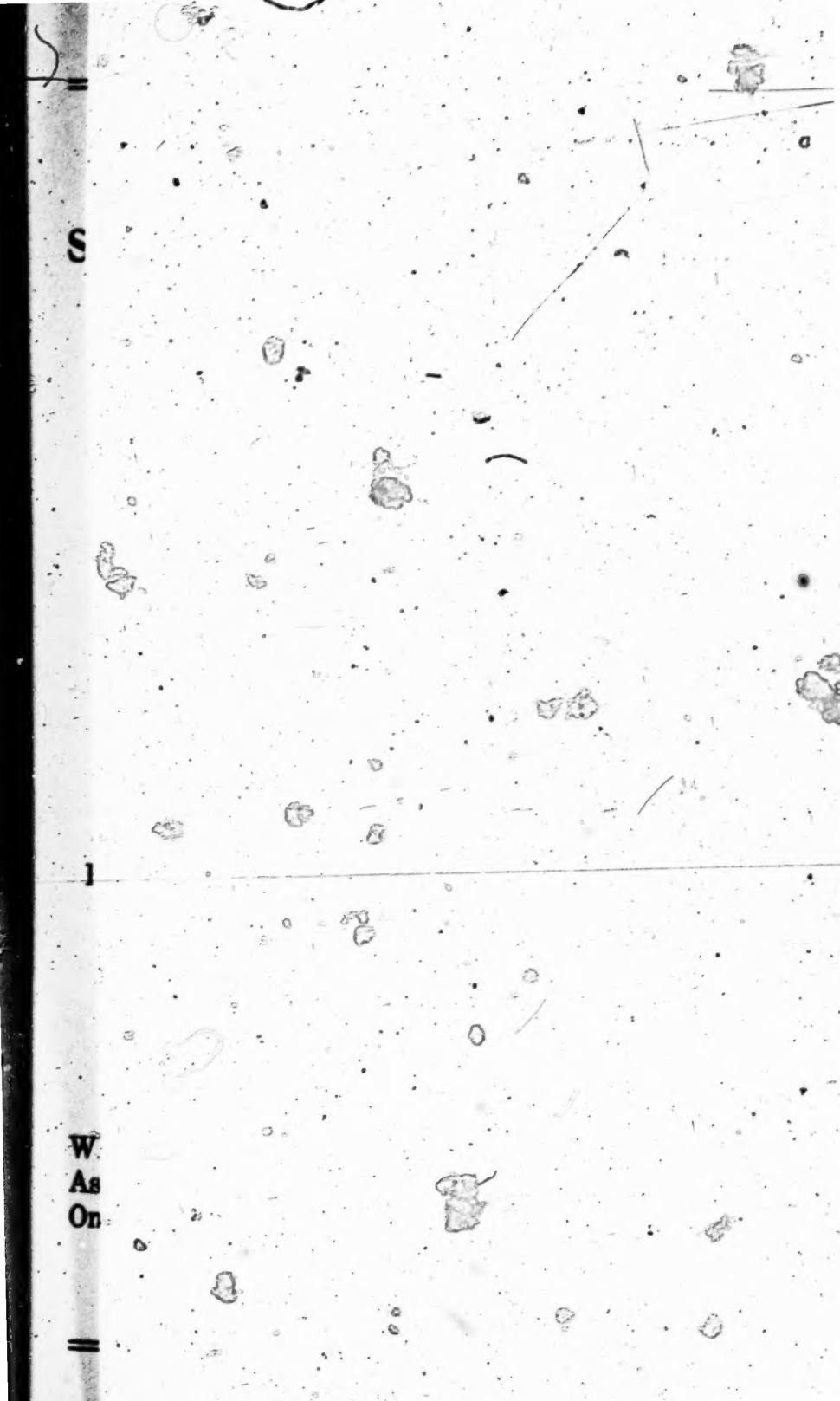
It is therefore ordered that the judgment of the lower court, in so far as it adjudges said sections 2 and 4 of said ordinance unconstitutional and void, be, and the same is hereby affirmed.

It is further ordered that said judgment, in so far as it adjudges other parts of the ordinance unconstitutional and void, be, and the same is hereby annulled.

DUCKER, *J.*

I concur:

TABER, *C. J.*



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney General of Alabama,
For The State of Alabama.

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On The Brief.

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OPINION OF THE COURT BELOW

I.

The opinion of the Court of Appeals of Alabama which petitioner asks this Court to Review is reported in 189 So. 913, certiorari denied, without opinion, by the Supreme Court of Alabama, 189 So. 914.

II.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the Court of Appeals rendered on January 17, 1939. The statutory provision which petitioner relies upon as giving this Court jurisdiction is Section 237 (b) of the United States Judicial Code, as amended by an Act of February 13, 1935, 43 Statutes 939 (Section 344, Title 28, U. S. C. A.).

It is insisted by petitioner that the Court of Appeals has decided a Federal question of substance not heretofore determined by this Court or has decided it in a way not in accord with the applicable decisions of this Court, petitioner stating that the questions presented are:

> "1. Whether or not Alabama's anti-picketing law, Section 3448, supra, is violative of the XIVth Amendment to the Constitution of the United States in that it deprives the petitioner of freedom of speech and assemblage.
>
> "2. Whether or not the Alabama courts deprived the petitioner of the protection of the due-process of law clause of the XIVth Amendment, supra, by holding that petitioner's actions on the occasion in question, were within the purview of the prohibition implied in the statute; i. e. Section 3448."

III.

STATEMENT OF THE CASE

Petitioner was one of several persons on a picket line at the Brown Wood Preserving Company, Inc. at Brownville in Tuscaloosa County, Alabama, occupying such position on the picket line in pursuance to a strike order of November 24, 1937 (R. 9). It appears that some time after the issuance of the strike order, a notice was posted on the premises of the Brown Wood Preserving Company by the company notifying its employees that the plant would resume operations (R. 9). The chief witness for the State, Clarence Simpson, an employee of the Brown Wood Preserving Company and a non-Union man, testified that, having read the notice, he attempted to report to work on the date indicated therein; that when he reached the plant he saw a member of the Union, Byron Thornhill, this petitioner, on the picket line at the plant, and that Byron Thornhill "came out and told me they were on a strike and did not want anybody to go up there to work" (R. 10). It appears from Simpson's testimony that a picket line had been maintained around the plant since the time the strike had been called "with two picket posts on said line and about six or eight men on each picket post," and that "three shifts of men stay on the post in each tweny-four hours" (R. 9). According to Union member J. M. Walden, also a witness for the State, the picket "made assurance that there would be no work going on there" (at the Brown Wood Preserving Company plant) (R. 12).

No evidence was introduced by the defendant.

The petitioner was arrested for his activities in connection with the picket line, and prosecuted for violation of Section 3448 of the Code of Alabama, 1923, which provides as follows:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The case was tried in the Inferior Court of Tuscaloosa County and from the judgment of conviction in that court petitioner appealed to the Circuit Court of the county. The solicitor of said Circuit Court duly filed his complaint against petitioner, and the defendant, failing to demand trial by jury, was placed on trial on December 20, 1937, before

the Circuit Court of Tuscaloosa County, sitting without a jury. The Court found the defendant guilty of the offense of loitering and picketing denounced by Section 3448, supra, and assessed a fine of $100 as punishment for the commission of said offense, whereupon, petitioner appealed to the Court of Appeals of Alabama, which, on January 17, 1939, affirmed the decision of the Circuit Court of Tuscaloosa County (189 So. 913). Rehearing was denied by the Court of Appeals on May 23, 1939, whereupon petitioner applied to the Supreme Court of Alabama for writ of certiorari to the Court of Appeals to review and revise the judgment and decision of that court, which writ was denied without opinion by the Supreme Court of Alabama on June 15, 1939 (189 So. 914).

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF ALABAMA IN THAT IT DOES NOT AFFIRMATIVELY APPEAR FROM THE RECORD THAT A FEDERAL QUESTION WAS NECESSARILY DECIDED IN DETERMINING THE CAUSE.

On appeal from the Circuit Court of Tuscaloosa County to the Court of Appeals of Alabama, the review sought by this petitioner involved questions of rights under the Constitution and laws of the State of Alabama and under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals affirmed the judgment of the Circuit Court of Tuscaloosa County (189 So. 913), stating in its opinion that its decision was based entirely upon the former decisions of the Supreme Court of Alabama, as was required by statute (Code of Alabama, 1923, Section 7318). The Supreme Court cases cited as authority for its conclusion that Section 3448 of the Code of Alabama, 1923, (the forerunner of which was Section 6395 of the Code of 1907) was constitutional were *Hardie-Tynes Mfg. Co. v. Cruise et al*, 189 Ala. 66, 66 So. 657, and *O'Rouke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, certiorari denied without opinion, 232 Ala. 355, 168 So. 209. The Hardie-Tynes case was the earlier of the two decisions, being decided November 17, 1914. In that case it is to be noted that

the Court made no reference to the Constitution of the United States in passing on the question presented to it for decision. The court merely stated:

"It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. *No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none.* Certain it is that a right to actively and directly interfere with and prevent the operation of a lawful business of another is not included among the inalienable rights of 'life, liberty, and the pursuit of happiness.' The 'liberty' guaranteed by the Constitution (article 1, section 1) is liberty regulated by law and the social compact, and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional rights of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other person to pursue his business unmolested? It is clear that this notion of liberty utterly ignores 'the other fellow,' and denies to him the

very freedom it claims for itself." (Emphasis supplied)

Obviously, the Supreme Court was considering only the Constitution of Alabama.

In the O'Rouke case, decided on February 18, 1936, the Court of Appeals on the original hearing stated:

> "So far as we are able to ascertain the statutes in question are valid enactments and the provisions of the statutes in question in no manner offend *the Constitution of this state.* This is our conclusion after a careful and attentive consideration of the questions, in all of their phases, has been accorded." (Emphasis supplied)

It appears that the Court disposed of all the questions presented to it by basing its conclusions upon consideration of only the Constitution of Alabama. However, on rehearing it was insisted by counsel that the opinion be extended, and the Court, after stating that it had no inclination to deprive the appellant of any right or to restrict in any manner his right of review, held that the ruling of the trial court had no tendency to deprive the appellant of any rights guaranteed him by the provisions of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court denied certiorari without opinion, and there is no showing that any Federal question was considered by that court—the highest court of the State of Alabama.

It therefore appears that the Court of Appeals of Alabama in its opinion in this case has not affirmatively stated that its decision rested upon the application of the Constitution of the United States. The Supreme Court of Alabama denied certiorari, thus affirming the judgment of the Court of Appeals, but without opinion (189 So. 914). The grounds of the decision of the Supreme Court are left to conjecture. Even assuming that it may be surmised, from the decisions quoted in its opinion, that the Court of Appeals intended to rest its decision upon a consideration of the Fourteenth Amendment, and that the denial of certiorari by the Supreme Court was upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State of Alabama, we call the Court's attention to the line of cases holding that jurisdiction cannot be founded upon surmise.

Eustis v. Bolles, 150 U. S. 361, 366, 367;

Lynch v. New York, 293 U. S. 52, 54;

Whitney v. California, 274 U. S. 357, 360, 361.

In *Lynch v. New York*, supra, it was stated:

> "It is essential to the jurisdiction of this Court, in reviewing a decision of a state that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the

federal question was necessary to the determination of the case, and that it was actually decided or that the judgment rendered could not have been given without deciding it."

The Court also states in the Lynch case that:

"Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

In the present case, the record shows that in the demurrer to the affidavit in the Inferior Court of Tuscaloosa County (R. 3, 4—Demurrer No. 4), in the demurrer to the complaint in the Circuit Court of Tuscaloosa County (R. 6, 7—Demurrer No. 4), and in the petition for certiorari to the Court of Appeals (R. 20, 21—Grounds No. 1, 3 and 6) counsel raised the constitutionality of the statute under both the Constitution of Alabama and the Constitution of the United States. Neither the decision of the Court of Appeals nor the decision of the Supreme Court of Alabama on certiorari specifically treats the questions involving the Fourteenth Amendment to the Constitution of the United States. It is submitted that since it does not affirmatively appear upon which of the two grounds the judgment of these courts was based, this Court should not now take jurisdiction of the cause.

It may be insisted, however, that judgment in this cause could not have been rendered without deciding the federal question. Both the Court of Appeals and the Supreme Court judicially knew that this Court had settled the constitutionality of satutory provisions calculated to prohibit *unlawful* picketing.

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184;

Truax v. Corrigan, 257 U. S. 312;

O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 267;

Senn v. Tile Layers Union, 301 U. S. 468, 479.

It is reasonable to presume, therefore, that these appellate courts of the State of Alabama, in considering this question, determined from the facts, as will be hereinafter shown, that what was involved was not an act of "peaceful picketing" but rather that there existed a picket line calculated to bring about fear and intimidation, together with the ensuing disturbances and breaches of the peace which so often follow such activities.

Applying the rule, therefore, that this Court will not resort to conjecture to determine whether the court of last resort of a State has passed on a federal question, it is submitted that the lack of jurisdiction is here clearly shown.

II.

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IN ITS APPLICATION TO THIS PETITIONER HAS NOT DEPRIVED HIM OF ANY RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is yet a further reason why this Court should not take jurisdiction of this cause. One attacking the constitutionality of a statute is the champion of no rights but his own.

> Henneford v. Silas Mason Co., 300 U. S. 577, 583.

This rule, when applied to this petitioner, can only result in this Court denying the petition.

In this case it has been shown that petitioner was a member of a picket line which was maintained on the property of the plant picketed throughout the twenty-four hour period of every day during which the strike existed, and that at least six men were on the picket line at all times. Petitioner now insists that Section 3448 of the Code of Alabama, 1923, prevents "peaceful picketing" and, therefore, amounts to an exercise of arbitrary power in violation of the due process of law provision contained in the Fourteenth Amendment.

It is respectfully submitted (assuming for the moment that Section 3448 does make unlawful "peaceful picketing", and that a statutory enactment prohibiting "peaceful picketing" is violative of the Fourteenth Amendment to the Constitution) that this petitioner is in no position to raise this constitutional question in this court for the reason that he was not "peacefully picketing" but, on the contrary, that it clearly appears from the evidence that the picket line of which he was a part was in such proximity to the plant, and of such numbers, as to indicate that its prime purpose was one of intimidation rather than peaceful pursuit.

This court in *American Steel Foundries v. Tri-City Central Trades Council et al.*, 257 U. S. 184, 204, speaking through the late Mr. Chief Justice Taft, in considering the decree of injunction in a labor controversy entered in the District Court for the Southern District of Illinois before the date of the Clayton Act (Oct. 15, 1914, C. 323, 38 Stat. 738), but which was pending on appeal in the Circuit Court of Appeals when the act was approved, after holding that Section 20 of the Clayton Act was enacted to forbid an injunction against peaceful picketing, concluded:

> "How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the rights of others to en-

joy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free.

"*The nearer this importunate intercepting of employees or would-be employees is to the place of business, the greater the obstruction and interference with the business and especially with the property right of access of the employer.* Attempted discussion and argument of this kind in such proximity is certain to attract attention and congregation of the curious, or, it may be, interested bystanders, and thus to increase the obstruction as well as the aspect of intimidation which the situation quickly assumes. *In the present case the three or four groups of picketers, were made up of from four to twelve in a group.* They constituted the picket lines. Each union interested, electricians, cranemen, machinists and blacksmiths, had several representatives on the picket line, and assaults and violence ensued. They began early

and continued from time to time during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. *The numbers of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceful persuasion.* The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful. When one or more assaults or disturbances ensued, they characterized the whole campaign, which became effective because of its intimidating character, in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere. Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it. We are supported in that view by many well reasoned authorities, although there has been contrariety of view. Barnes & Co. v. Typographical Union, 232 Ill. 424; Franklin Union v. People, 220 Ill. 355; Philip Henrici Co. v. Alexander, 198 Ill. App. 568; Vegelahn v. Gunt-

ner, 167 Mass. 92; Jonas Glass Co. v. Glass Association, 72 N. J. Eq. 653, s. c. 77 N. J. Eq. 219; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759; Frank & Dugan v. Herold, 63 N. J. Eq. 443; Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429; Pierce v. Stablemen's Union, 156 Cal. 70; Local Union No. 313 v. Stathakis, 135 Ark. 86; Beck v. Teamsters' Union, 118 Mich. 497; In re Langell, 178 Mich. 305; Jensen v. Cooks' & Waiters' Union, 39 Wash. 531; St. Germain v. Bakery & Confectionery Workers' Union, 97 Wash. 282; Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336; Union Pacific R. R. Co. v. Ruef, 120 Fed. 102; Atchison, Topeka & Santa Fe Ry. Co. v. Gee, 139 Fed. 582; Stephens v. Ohio State Telephone Co., 240 Fed. 759.

* * *

"Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. *We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant*, that such rep-

resentatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous, or threatening, and *that they shall not approach individuals together but singly*, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It becomes a question for the judgment of the Chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries." (Emphasis supplied)

The cases cited by the learned Chief Justice in support of his statements are all the authority needed to demonstrate that the petitioner should not be heard to complain that he is denied any essential inherent right by the application of Section 3448 of the Code of Alabama, 1923, to him.

Measured by the test laid down above there can be no doubt but that petitioner was a member of a group whose fixed purpose was the intimidation of those employees who were returning to work as re-

quested by the officials of the Brown Wood Preserving Company. In no sense of the word can petitioner's activity on such picket line be passed off as peaceful.

The statement of witness Walden (R. 12) that the picketers "made assurance that there would be no work going on" at the plant demonstrates the actual nature and character of the picket. It was a standing threat of violence to anyone so foolhardy as to resist its commands. The fact that on this particular occasion no violence was resorted to by Thornhill cannot control, for in the final analysis the threat of violence was present and must have had its effect upon those employees who sought to return to work.

The very word "picket" is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude towards the individual or corporation against whom the labor union has a grievance. To quote Mr. Eddy,

> "It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence, or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket under the most favorable consideration

means an interference between employer seeking employees, and men seeking employment."

1 Eddy on Combinations, Section 539.

It is not difficult to perceive that picketing by a great number of persons, such as in the instant case, tends to intimidate those who desire to become employees of the complainant, even though no acts of violence be committed. Manifestly, the use of a large number of pickets cannot reasonably be regarded as intended for a lawful purpose. The assembling of such a large number of picketers on the path leading to the Brown Wood Preserving Company plant, undoubtedly had a tendency to intimidate those persons who desired to work for the company whose place of business was so picketed. In *American Steel Foundries v. Tri-City Central Trades Council*, supra, in the opinion of Chief Justice Taft, it is said that the term "picket" indicates a militant purpose, inconsistent with persuasion; and that though a striker may accost an employee on the street with a view to persuade him to cease employment, persistence, importunity, and dogging the employee after the offer of information or advice is declined is unjustifiable annoyance and obstruction, which is likely soon to savor of intimidation, and from such the person sought to be influenced has a right to be free and his employer has a right to have him free. In the same case it was held that the posting of three or four groups of pickets, each group

composed of from four to twelve men who were members of various unions involved, in the street through which the employees of the plant against which the strike was declared had to pass to and from work, so that the passage of employees was in effect running the gauntlet, in itself was intimidation and inconsistent with peaceable persuasion. The court further held:

> "A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not under conditions which subject the individuals who wish to work to a severe test of nerve and physical strength and courage."

In the Tri-City Case one "observer" was permitted at each entrance and exit of the complainant's plant with the "right of observation, communication and persuasion, avoiding abuse, libel or threats," who in "their efforts singly should not obstruct an unwilling listener by importunate following or dogging of his steps." But this obviously was not unlawful "picketing." Inoffensive observers are lawful; militant pickets are not.

In *Truax v. Corrigan*, 257 U. S. 312, Mr. Chief Justice Taft, referring to *American Steel Foundries v. Tri-City Central Trades Council*, supra, in which

he also wrote the opinion for the Supreme Court of the United States, said:

> "We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms."

Picketing is a militant word and the act of picketing is militant in both character and purpose. Its purpose, compulsion or coercion, is accomplished only by intimidation.

The case of *People v. Harris*, 91 P. (2d) 989, relied on by petitioner is authority only for the conclusion that—under the facts of that case wherein it was expressly stipulated in an agreed statement presented to the court that the picket was carried on without intimidation or coercion and that the persons picketing did not commit any act or acts tending to intimidation or coercion in that the picketing was peacefully carried on by two of the strikers walking back and forth in front of the picketed establishment with signs stating that the business was unfair to the Denver Building Trade Council,—the right to carry on such picketing was guaranteed by the Fourteenth Amendment of the Constitution and a statute preventing such a picket was unconstitutional. The court specifically states:

> "What has been said thus far is on the assumption that violence, intimidation and coercion are foreign to peaceful picketing. No court

has ever upheld the right to injure or destroy business through a tortious act."

Assuming for the purpose of discussion that the decision in People v. Harris is sound, it is nevertheless submitted that under the facts present in this case the petitioner cannot be heard to complain for the reason that he was picketing, not peacefully, but in such manner as to constitute intimidation.

Petitioner states in his brief that the Alabama Supreme Court in the case of *Hardie-Tynes v. Cruise*, 189 Ala. 66, 66 So. 657, has definitely ascertained that Alabama's so-called anti-picketing statute prohibits "peaceful picketing" or peaceful persuasion and petitioner, therefore, concludes that the statute must be unconstitutional. However, it is to be noted that in the present case, as has been shown, the Court has not applied the statute to a peaceful picketer but has applied it to one shown to have been a member of a picket line, the main purpose of which was to threaten and intimidate.

In *Atlantic Coast Line v. Ford*, 287 U. S. 502, 505, this court stated:

> "If the assailed provisions as construed and applied in the present case, afford due process, appellants cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants. (Citing cases)."

Petitioner's insistence that in this particular case he was denied the liberties guaranteed him by the Fourteenth Amendment to the Constitution must be considered in the light of the rule that these liberties are not in any sense of the word guaranteed to be exercised in an unfettered fashion, but that the State, in the exercise of its police power, may limit the manner in which such liberties are exercised. The character of every act depends upon the circumstances in which it is done.

Schenck v. United States, 249 U. S. 47, 52;

Aikers v. Wisconsin, 195 U. S. 194, 205, 206.

Thus, it has been held that the most stringent protection of free speech would not protect a man from an injunction against uttering words that may have all the effect of force.

Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439;

Jacobson v. Massachusetts, 197 U. S. 11.

It is submitted, therefore, that since it clearly appears from the evidence that the petitioner was a member of a picket line located very close to the place of business of his former employer, and since it further appears that the petitioner was a member of a group of picketers consisting of a relatively large number, considering the location of the picket, it must be concluded that the picket was not a "peaceful picket" within the meaning of the authorities

cited by counsel for petitioner, but rather that such picket was an offensive and unjustifiable annoyance calculated to bring about public disturbances and breaches of the peace, and that the petitioner, being the champion of only his own rights, cannot invoke the jurisdiction of this Court to declare the Alabama statute unconstitutional.

III.

THE COURT SHOULD NOT TAKE JURISDICTION OF THIS PETITION FOR THE REASON THAT IF A FEDERAL QUESTION IS IN FACT PRESENTED, SUCH QUESTION IS NOT SUBSTANTIAL.

This Court has held time and again that:

> "* * * Although the validity of a law was formally drawn in question it is our duty to decline jurisdiction whenever it appears that the constitutional question is not, and was not at the time of granting the writ, substantial in character. Zucht v. King, 260 U. S. 174, 176."

As noted above, this Court has determined that a "peaceful picket" as used "implies not only absence of violence but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's (employer's) business." *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 479. In the instant case, it appearing that in truth and

in fact the picket line as set up was calculated to prevent, by force, menace or intimidation, the Brown Wood Preserving Company from employing laborers, it is respectfully submitted that under the rules heretofore announced by this Court this petition must be denied.

CONCLUSION

For the reasons hereinabove set forth, we believe that this Court does not have jurisdiction in this case, and on such reasons we base our contention that this petition for writ of certiorari should be denied, or in the alternative, we respectfully suggest that the judgment of the Court of Appeals of Alabama be affirmed.

Respectfully submitted,

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COUNSEL FOR STATE OF ALABAMA.

WILLIAM H. LOEB,

ASSISTANT ATTORNEY GENERAL,
ON THE BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 514

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA

Respondent

BRIEF FOR RESPONDENT

OPINION OF THE COURT BELOW

I.

The case is before this Court pursuant to certiorari granted December 11, 1939. The opinion of the Court of Appeals of Alabama, which petitioner asks this Court to review, is reported in 189 So. 913, certiorari denied, without opinion, by the Supreme Court of Alabama, 189 So. 914. All of the judges of the Court of Appeals concurred in the opinion of the Court of Appeals and all of the justices of the Supreme Court concurred in the opinion denying certiorari.

II.

JURISDICTION

1. The statutory provision by which jurisdiction of this proceeding is authorized is Section 344 of Title 28 U. S. C. A. (Judicial Code, Section 237, as amended by an Act of February 13, 1935, 43 Stats. 939).

2. The opinion of the Court of Appeals was rendered on January 17, 1939. On June 15, 1939, the Supreme Court entered its order denying petition for certiorari.

3. Petitioner is here insisting that Alabama's so-called anti-picketing law, Section 3448 of the Code of Alabama, 1923, is violative of the Fourteenth Amendment to the Constitution of the United States, in that, it deprives the petitioner of freedom of speech and assemblage.

III.

STATEMENT OF THE CASE

Petitioner was one of several persons on a picket line at the Brown Wood Preserving Company, Inc. at Brownville in Tuscaloosa County, Alabama, occupying such position on the picket line pursuant to a strike order of November 24, 1937 (R. 9). The evidence reveals that prior to the strike approximately one hundred men were employed at the plant, all but four of them being Union members (R. 12).

It appears that approximately two or three weeks (R. 9, 11) after the issuance of the strike order, a notice was posted on the premises of the Brown Wood Preserving Company by the company notifying its employees that the plant would resume operations (R. 9). The chief witness for the State, Clarence Simpson, an employee of the Brown Wood Preserving Company and a non-Union man, testified, without contradiction, that, having read the notice, he attempted to report to work on the date indicated therein; and when he reached the plant he saw a member of the Union, Byron Thornhill, this petitioner, on the picket line at the plant, and that Byron Thornhill, *in company with six or eight other men*, "came out and told me they were on a strike and did not want anybody to go up there to work" (R. 10). It appears from Simpson's testimony that a picket line had been continuously maintained around the plant for the two or three weeks since the time the strike had been called "with two picket posts on said line and about six or eight men on each picket post," and that "three shifts of men stay on the post in each twenty-four hours" (R. 9). According to Union member, J. M. Walden, also a witness for the State, the picket "made assurance that there would be no work going on there" (at the Brown Wood Preserving Company plant) (R. 12).

There was also evidence introduced tending to show that the company attempted to resume operations—on the date stated in the notice—by building a fire in one of their cranes but that "some of the pickets took the fire out of the crane" (R. 11).

No evidence was introduced by the defendant.

The petitioner was arrested for his activities in connection with the picket line, and prosecuted for violation of Section 3448 of the Code of Alabama, 1923, which provides as follows:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The case was tried in the Inferior Court of Tuscaloosa County (R. 1, 2, 3) and from the judgment of conviction in that court (R. 5) petitioner appealed to the Circuit Court of the county. The solicitor of said Circuit Court duly filed his complaint against petitioner (R. 5), and the defendant, failing to demand trial by jury, was placed on trial

on December 20, 1937, before the Circuit Court of Tuscaloosa County, sitting without a jury. (R. 9) The Court found the defendant guilty of the offense of loitering and picketing denounced by Section 3448, supra, and assessed a fine of $100 as punishment for the commission of said offense. (R. 8) Thereupon, petitioner appealed to the Court of Appeals of Alabama, (R. 14) which court, on January 17, 1939, affirmed the decision of the Circuit Court of Tuscaloosa County (189 So. 913). (R. 16) Rehearing was denied by the Court of Appeals on May 23, 1939, without further opinion (R. 18), whereupon petitioner applied to the Supreme Court of Alabama for writ of certiorari to the Court of Appeals to review and revise the judgment and decision of that court, (R. 20) which writ was denied without opinion by the Supreme Court of Alabama on June 15, 1939 (189 So. 914). (R. 22) Petition for certiorari was filed in this court on November 9, 1939, and granted December 11, 1939.

We have set forth the evidence with great particularity herein for the reason that petitioner, on page 11 of his brief in support of petition for writ of certiorari makes the statement that his action on the occasion in question consisted of asking another employee "without threats, or show of force, direct or implied, not to resume his employment in an industrial plant until a strike then in progress was settled." We do not feel that this statement is justified by the evidence and for that reason we have attempted to set out the facts as we have found them to appear of record.

It is also to be noted that in petitioner's "statement of the case" on page 11 of brief, he asserts that the Court of Appeals "interpreted the statute in the case at bar, as preventing any picketing whatsoever, regardless of whether or not it was peaceful and further construed the statute as preventing one worker asking another worker not to accept employment in an employer's plant." We respectfully direct the court's attention to the opinion of the Court of Appeals of Alabama, which is set forth on pages 16 and 17 of the record. Nowhere therein do we find any indication that the Court of Appeals interpreted the statute as preventing all picketing whatsoever, whether or not it was peaceful, or as preventing one worker asking another worker not to accept employment in an employer's plant. All that was held was that the evidence introduced upon the trial of Thornhill was sufficient to bring his actions within the prohibition of the statute which the Court stated had previously been held constitutional in the cases which were thereafter cited in the opinion.

IV.

ARGUMENT.

A

IT DOES NOT AFFIRMATIVELY APPEAR FROM THE RECORD THAT A FEDERAL QUESTION WAS NECESSARILY DECIDED IN DETERMINING THE CAUSE.

On appeal from the Circuit Court of Tuscaloosa County to the Court of Appeals of Alabama, the review sought by this petitioner involved questions of rights under the Constitution and laws of the State of Alabama and under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals affirmed the judgment of the Circuit Court of Tuscaloosa County (189 So. 913), stating in its opinion that its decision was based entirely upon the former decisions of the Supreme Court of Alabama, as was required by statute (Code of Alabama, 1923, Section 7318). The Supreme Court cases cited as authority for its conclusion that Section 3448 of the Code of Alabama, 1923, (the forerunner of which was Section 6395 of the Code of 1907) was constitutional were *Hardie-Tynes Mfg. Co. v. Cruise et al*, 189 Ala. 66, 66 So. 657, and *O'Rouke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, certiorari denied without opinion, 232 Ala. 355, 168 So. 209. The Hardie-Tynes case was the earlier of the two decisions, being decided November 17, 1914. In that case it is to be noted that

the Court made no reference to the Constitution of the United States in passing on the question presented to it for decision. The court merely stated:

> "It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. *No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none.* Certain it is that a right to actively and directly interfere with and prevent the operation of a lawful business of another is not included among the inalienable rights of 'life, liberty, and the pursuit of happiness.' The 'liberty' guaranteed by the Constitution (article 1, section 1) is liberty regulated by law and the social compact, and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional rights of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other person to pursue his business unmolested? It is clear that this notion of liberty utterly ignores 'the other fellow,' and denies to him the very freedom it claims for itself." (Emphasis supplied)

Obviously, the Supreme Court was considering only the Constitution of Alabama.

In the O'Rouke case, decided on February 18, 1936, the Court of Appeals on the original hearing stated:

> "So far as we are able to ascertain the statutes in question are valid enactments and the provisions of the statutes in question in no manner offend *the Constitution of this state.* This is our conclusion after a careful and attentive consideration of the questions, in all of their phases, has been accorded." (Emphasis supplied)

It appears that the Court disposed of all the questions presented to it by basing its conclusions upon consideration of only the Constitution of Alabama. However, on rehearing in the O'Rouke case it was insisted by counsel that the opinion be extended, and the Court, after stating that it had no inclination to deprive the appellant of any right or to restrict in any manner his right of review, held that the ruling of the trial court had no tendency to deprive the appellant of any rights guaranteed him by the provisions of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court denied certiorari without opinion, and there is no showing that any Federal question was considered by the court—the highest court of the State of Alabama.

It therefore appears that the Court of Appeals of Alabama in its opinion in this case has not affirm-

atively stated that its decision rested upon the application of the Constitution of the United States. The Supreme Court of Alabama denied certiorari, thus affirming the judgment of the Court of Appeals, but without opinion (189 So. 914). The grounds of the decision of the Supreme Court are left to conjecture. Even assuming that it may be surmised, from the decisions quoted in its opinion, that the Court of Appeals intended to rest its decision upon a consideration of the Fourteenth Amendment, and that the denial of certiorari by the Supreme Court was upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State of Alabama, we call the Court's attention to the line of cases holding that jurisdiction cannot be founded upon surmise.

Eustis v. Bolles, 150 U. S. 361, 366, 367;

Lynch v. New York, 293 U. S. 52, 54;

Whitney v. California, 274 U. S. 357, 360, 361.

In *Lynch v. New York, supra*, it was stated:

> "It is essential to the jurisdiction of this Court, in reviewing a decision of a state that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the case, and that it was actually decided or that the judgment rendered could not have been given without deciding it."

The Court also states in the Lynch case that:

"Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

See also McGoldrick v. Gulf Oil Co., 84 L. Ed. 336 (Adv. Sheet).

In the present case, the record shows that in the demurrer to the affidavit in the Inferior Court of Tuscaloosa County (R. 3, 4—Demurrer No. 4), in the demurrer to the complaint in the Circuit Court of Tuscaloosa County (R. 6, 7—Demurrer No. 4), in the motion to exclude the evidence in the Circuit Court (R. 13), and statement of counsel (R. 14) that he wanted to raise constitutionality of the statute and claimed it to be violative of the Constitution of the State of Alabama and of the United States, and in the petition for certiorari to the Court of Appeals (R. 20, 21—Grounds No. 1, 3 and 6) counsel raised the constitutionality of the statute under both the Constitution of Alabama and the Constitution of the United States. Neither the decision of the Court of Appeals nor the decision of the Supreme Court of Alabama on certiorari specifically treats the questions involving the Fourteenth Amendment to the Constitution of the United States. It is submitted that since it does not affirmatively appear upon which of the two grounds the

judgment of these courts was based, this Court should not have taken jurisdiction of the cause.

It may be insisted, however, that judgment in this cause could not have been rendered without deciding the federal question. Both the Court of Appeals and the Supreme Court judicially knew that this Court had settled the constitutionality of statutory provisions calculated to prohibit *unlawful* picketing.

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184;

Truax v. Corrigan, 257 U. S. 312;

O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 267;

Senn v. Tile Layers Union, 301 U. S. 468, 479.

It is reasonable to presume, therefore, that these appellate courts of the State of Alabama, in considering this question, determined from the facts, as will be hereinafter shown, that what was involved was not an act of "peaceful picketing" but rather that there existed a picket line originated for an unlawful purpose and calculated to bring about fear and intimidation, together with the ensuing disturbances and breaches of the peace which so often follow such activities.

Applying the rule, therefore, that this Court will not resort to conjecture to determine whether

the court of last resort of a State has passed on a federal question, it is submitted that the lack of jurisdiction is here clearly shown.

B

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IN ITS APPLICATION TO THIS PETITIONER HAS NOT DEPRIVED HIM OF ANY RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is yet a further reason why this Court should not reverse the judgment of the Supreme Court of Alabama and why it should now conclude that this statute does not deny this petitioner any rights guaranteed him by the Federal Constitution.

One attacking the constitutionality of a statute is the champion of no rights but his own.

Henneford v. Silas Mason Co., 300 U. S. 577, 583.

This rule, when applied to this petitioner, can only result in this Court dismissing the petition as having been improvidently granted or affirming this cause.

It has been shown that petitioner was a member of a picket line which was maintained on the property of the plant picketed throughout the twenty-four

hour period of every day for the more than two weeks during which the strike existed, and that at least twelve men were on the picket line at all times. Petitioner here insists that Section 3448 of the Code of Alabama, 1923, prevents "peaceful picketing" and, therefore, amounts to an exercise of arbitrary power in violation of the due process of law provision contained in the Fourteenth Amendment.

It is respectfully submitted (assuming for the moment that Section 3448 does make unlawful "peaceful picketing," and that a statutory enactment prohibiting "peaceful picketing" is violative of the Fourteenth Amendment to the Constitution) that this petitioner is in no position to raise this constitutional question in this court for the reason that he was not "peacefully picketing" but, on the contrary, that it clearly appears from the undisputed evidence that the picket line of which he was a part was in such proximity to the plant, and of such numbers, as to indicate that its prime purpose was to intimidate rather than to peacefully persuade prospective employees of the company.

The courts, both federal and state, have established quite definite rules for determining the boundaries governing the extent to which picketing may be carried before it becomes "intimidating." This court in *American Steel Foundries v. Tri-City Central Trades Council, et al.*, 257 U. S. 184, 204, in considering the decree of injunction in a labor controversy entered in the District Court for the Southern District of Illinois before the date of the Clayton Act (Oct. 15, 1914, C. 323, 38 Stat. 738) but which was

pending on appeal in the Circuit Court of Appeals when the act was approved, after holding that Section 20 of the Clayton Act was enacted to forbid an injunction against peaceful picketing, concluded:

> "In the present case the three or four groups of picketers, were made up of from four to twelve in a group. They constituted the picket lines. * * * *The numbers of the pickets in the groups constituted intidimation.* The name 'picket' indicated a militant purpose, inconsistent with peaceful persuasion. * * * The nearer this importunate intercepting of employees or would be employees to the place of business, the greater the obstruction and interference with the business and especially with the property rights of access of the employer." (Emphasis supplied)

After reaching these conclusions, and stating that "each case must turn on its own circumstances", this court proceeded to announce the following guide:

> *"The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."* (Emphasis supplied)

In line with this principle, in the Tri-City case, supra, one "observer" was permitted at each entrance and exit of complainant's plant with the "right of observation, communication and persuasion, avoiding abuse, libel or threats" who in "their efforts singly should not obstruct an unwilling

listener by importunate following or dogging of his steps."

The cases cited by the learned Chief Justice in the Tri-City case, supra, in support of his conclusions are sufficient authority to demonstrate that the petitioner should not be heard to complain that he is denied any essential inherent right by the application of Section 3448 of the Code of Alabama, 1923, to him.

The Tri-City yardstick and that of the cases cited therein ineluctably impels the conclusion that petitioner was a member of a group engaged in the intimidation of those employees who were returning to work as requested by the officials of the Brown Wood Preserving Company. In no sense of the word can petitioner's activities on such line be passed off as peaceful. The State's chief witness asserted that this petitioner approached him "in company with six or eight other men" (R. 10) and told him that "he did not want anybody to go up there (to the Brown Wood Preserving Company plant) to work" (R. 10). There is no indication that Thornhill attempted to explain the purposes of the strike or of the picket to the witness, Simpson, or that he attempted to persuade Simpson, by force of logic, from going back to work. The testimony shows that he indicated to Simpson the fact that he (Thornhill) did not want Simpson to go back to work. This statement was made in the presence of six or eight other men. It is not difficult to perceive that such a statement in the presence of such a body of men must have tended to intimidate the man who desired

to return to his former employment at the Brown Wood Preserving Company. Manifestly the use of such a large number of pickets cannot reasonably be regarded as intended for a lawful purpose. Indeed, the statement of the State's witness, Walden (R .12) that the picketers "made assurances that there would be no work going on" at the plant demonstrates the actual nature and character of the picket. The picket, like the sentry in wartime, had one duty, and that was to prevent the enemy from passing. It was a standing threat of violence to anyone so foolhardy as to resist its commands. The fact that on this particular occasion no acts of violence were resorted to by Thornhill cannot control, for in the final analysis the threat of violence was present and must have had its effect upon those employees who sought to return to work.

Although, as hereinbefore stated, we are firmly convinced that the cases cited by Chief Justice Taft in the Tri-City case are ample support for the State's contention that petitioner was guilty of intimidating acts, for the convenience of this Court we here point out certain other cases which strongly indicate the nature of the intimidation which the courts are inclined to repress. In *Gevas v. Greek Restaurant Workers Club*, 99 N. J. Eq. 770, 783, the court after a very interesting and illuminating discussion of the rule in the *American Steel Foundries v. Tri-City G. T. Council*, supra, and the statement of Chief Justice Taft in *Truax v. Corrigan*, 257 U. S. 312, 340, that "peaceful picketing" is a "contradiction in terms" concludes:

"A single sentinel, constantly parading in front of a place of employment for any extended length of time may be just as effective in striking terror to the souls of the employees, bound there by their duty, as was the swinging pendulum in Poe's famous story 'The Pit and the Pendulum' to the victim chained in its ultimate path. In fact, silence is sometimes more striking and impressive than the loud mouthings of the mob. It is the show of force back of the demonstration, or the inevitableness of the impending disaster, which tries men's souls and drives them to desperation. It is admitted that back of the present demonstration is the full force and power of the American Federation of Labor, of which the pickets and their sentinels are scouts."

In the comparatively recent case of *Bayonne Textile Corp. v. American Federation of Silk Workers*, 114 N. J. Eq. 307, 168 A. 799, the Court of Chancery of New Jersey speaking to the particular question of intimidation by numbers states:

"Manifestly the use of a large number of pickets cannot reasonably be regarded as intended for a lawful purpose. The assembling of a large number of persons on the streets leading to complainant's factory, without extra pickets, undoubtedly has a tendency to terrorize other persons who might desire to work for complainant whose place of business is thus picketed."

In *LaFrance etc. Co. v. International Brotherhood of Electrical Workers*, 108 Ohio St. 61, 140 N. E. 899, the court concludes that:

> "Picketing in such numbers as to prevent free access to the plant of the employer, or in itself to constitute a threat of physical force, is unlawful."

In *Franklin Union No. 4, v. People of Illinois*, 220 Ill. 355, 77 N. E. 176, 185, the court states:

> "Intimidation and coercion are relative terms. What would put in fear a timid girl or weak woman or man might not terrorize the strong and resolute. All are entitled alike to the protection of the law."

The Supreme Court of Connecticut in *Levy & Devaney, Inc. v. International Pocketbook Workers Union et al.*, 114 Conn. 319, 148 Atl. 795, in holding that the conduct of a picket may be such as to constitute intimidation, even though there is no use of force or physical violence, concludes:

> "To intimidate is to inspire with fear, to overawe or make afraid. Fear may be inspired without physical violence or spoken threats, moral intimidation may be accomplished by a menacing attitude and a display of force which may coerce the will as effectively as actual physical violence. The gathering of strikers in considerable numbers at the entrance of a factory with threatening attitude toward em-

ployees who must run the gauntlet of a hostile picket line in going to and from work, may overawe and make them afraid by the show of force which itself is intimidating. The well-considered authorities all hold that the conduct of a strike may be such as to constitute intimidation, though there is no use of force or physical violence. State v. Stockford, 77 Conn. 227, 237, 58 A. 769, 107 Am. St. Rep. 28; Vegelahn v. Gunther, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Jefferson & Ind. Coal Co. v. Marks, 287 Pa. 171, 134 A. 430, 47 A. L. R. 745; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Keuffel & Esser v. Int. Ass'n of Machinists, 93 N. J. Eq. 429, 116 A. 9; Bomes v. Prov. Local No. 223 (R. I.) 155 A. 581; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375; 7 Labatt's Master & Servant, Section 2706; 1 Eddy on Combinations, Section 538; Cogley on Strikes & Lockouts, 292; 32 C. J. 166, 182."

See also *Greenfield v. Central Labor Council*, 104 Ore. 236, 192 P. 783, 207 P. 168, holding picketing cannot be peaceful where more than one picket is employed.

Also *Crouch v. Central Labor Council*, 134 Ore. 612, 293 P. 729 (Ore.). And see *Jefferson & I. Coal Co. v. Marks*, 134 A. 430, 287 Penn. 171 and *Bomes v. Prov. Local No.* 223, 51 R. I. 499, 155 A. 581, holding that a continuation of a picket line for an extended period of time created a situation calculated to engender annoyance, fear and intimidation.

In the Marks case, supra, the court stated:

> "Persuasion, too long and persistently continued, becomes a nuisance and an unlawful form of coercion."

There are also numerous decisions of the federal courts on the question. A number of them are gathered in *Ex Parte Richards*, 117 F. 658, 666. Most of these federal cases adopt the view stated in *In re: Dooling*, 23 F. 545, that:

> "A simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to burden and obstruct employees in the performance of their duties is not less obnoxious than the use of physical force for the same purpose. A 'request' under such circumstances is a direct threat and not intimidation, and will be punished as such."

Cf. *Vonnegan Machinery Co. v. Toledo Machinery & Tool Co.*, 263 F. 192, 199, wherein the court asserts that "practical people question the possibility of peaceful persuasion through the practice of picketing," citing the observations of Judge McPherson in *Atchison T. & S. F. Ry. Co. v. Gee*, 139 F. 582, 584, that:

> "There is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching."

The court in the Gee case, supra, after stating as above quoted, continued:

> "When men want to converse or persuade, they do not organize a picket line. When they only want to see who are at work, they go and see, and then leave, and disturb no one physically or mentally. But such picketing as is displayed in the case at bar by the evidence does, and is intended to, annoy and intimidate. The argument seems to be that anything short of physical violence is lawful. One man can be intimidated only when knocked down. *But the peaceful, law-abiding man can be and is intimidated by gesticulations, by menaces,* by being called harsh names, and by being followed, or compelled to pass, by men known to be unfriendly. Perhaps such a man may not be a bully, but is frail in size and strength, or he may be a timid man; but such a man is just as much entitled to go and come in quiet, without even mental disturbance, as has the man afraid of no one, and able with or without weapons to cope with all comers. *The frail man, or the man who shuns disturbances, or the timid man, must be protected, and the company has the right to employ such.*"

In view of the foregoing authorities, it is respectfully submitted that inasmuch as, by the accepted construction of the term, petitioner has been guilty of an "unlawful intimidation", he cannot now be heard to complain that a statute, which he insists prohibits "peaceful picketing", is unconstitu-

tional, for the reason that, as stated in the *Henneford v. Silas Mason Co. case*, 300 U. S. 577, 583, supra, he is the champion of no rights but his own and those rights admittedly are not impaired by Section 3448, if he was not "peacefully picketing".

C.

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IS A VALID EXERCISE OF THE POLICE POWER OF THE LEGISLATURE OF THE STATE OF ALABAMA.

This Court has repeatedly held that the Fourteenth Amendment to the Constitution of the United States does not destroy the power of the states to enact police legislation as to subjects within their control.

Davis v. Massachusetts, 167 U. S. 43, 47;

Barbier v. Connolly, 113 U. S. 273;

Minneapolis and St. Louis Ry. Co. v. Beckwith, 129 U. S. 26, 29;

Giozza v. Tiernan, 148 U. S. 657;

Jones v. Brim, 165 U. S. 180, 182.

Without doubt the property of the community is a proper subject for police regulation and protection, Munn v. Ill, 94 U. S. 113, 124, Patterson v. Kentucky, 97 U. S. 501, 504, and certainly it cannot

be disputed that a person's business is property and if lawfully conducted is entitled to protection from any unlawful interference.

Truax v. Corrigan, 257 U. S. 312, 327;

Gompers v. Buck Stove and Range Co., 221 U. S. 418;

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229;

International News Service v. Associated Press, 248 U. S. 215;

Duplex Co. v. Deering, 254 U. S. 443, 465.

United Union Brewing Co. v. Beck, 93 P. (2d) 772, 781 (Supreme Court of Washington, Sept. 13, 1939);

Safeway Stores v. Retail Clerks Union, 184 Wash. 322, 51 P. (2d) 372;

Meadowmoor Dairies v. Milk Wagon Drivers Assn., 371 Ill. 377, 21 N. E. (2d) 308.

It is conceded that there is a limit to the valid exercise of the police power by the states. There is no dispute concerning this general proposition. It is submitted, however, that in every case that comes before this Court where the protection of the federal constitution is sought to overthrow legislation of this character, the question necessarily arises for decision:

"Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty?"

Lochner v. N. Y. 198 U. S. 45, 56;

Graves v. Minnesota, 272 U. S. 425, 428;

Gitlow v. N. Y., 268 U. S. 652, 666, 667, 668, 669.

In determining this question, it is settled that this court should not and will not search for reasons to hold the act invalid. On the contrary, the burden is on petitioner to establish the fact that the statute is unreasonable, arbitrary or unnecessary. Mugler v. Kansas, 123 U. S. 623, 661.

In *Graves v. Minnesota*, supra, the court, after stating that every presumption is to be indulged in favor of the validity of a statute, (citing *Mugler v. Kansas*, 123 U. S. 623, 661), continues:

"And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest. Great No. Ry. Co. v. Clara City, 246 U. S. 434, 439; Gitlow v. N. Y. 268 U. S. 652, 668."

In *Chicago, B. & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 567, this court in referring to the guarantee of liberty under the Fourteenth Amendment, stated:

> "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * The principle involved * * is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. *The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.*
>
> "The principle was thus stated in *McLean v. Arkansas*, 211 U. S. 547, 548: 'The legisla-

ture, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. (Cases cited.) * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law; it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.'" (Emphasis supplied)

1.

Section 3448 Prohibits Only Picketing Carried On For The Purpose Of Injuring Another And Does Not Limit Other Picketing Activities.

This brings us, therefore, to a consideration of whether or not Section 3448 of the Code of Alabama, 1923, is a valid police regulation or whether it is so arbitrary and unreasonable as to interfere with those liberties guaranteed by the Fourteenth Amendment.

Labor disputes are as old as organized society. It is not the province of this brief to indulge in

polemics as to the merits of these age-old controversies, nor will we attempt to speculate upon whether or not an act of the legislature is the wisest or the best remedy for dealing with such problems. That is a matter committed by the Constitution of Alabama to the legislative branch of government.

Suffice it to say that the Legislature of Alabama, after considering the public needs enacted Section 3448 into law.

Particular attention is directed to the language of Section 3448:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, *for the purpose* of *hindering, delaying* or *interfering with* or *injuring any lawful business or enterprise of another*, shall be guilty of a misdemeanor; but nothing therein shall prevent any person from soliciting trade or business for a competitive business."

It is immediately apparent that it is not all loitering and not all picketing that is prohibited by the statute. Loitering and picketing for the purpose of advancing one's own well-being are obviously permitted. That which is prohibited is loitering without a just cause or legal excuse therefor, and picketing "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another." Indeed, petitioner was charged in the solicitor's complaint filed in the Circuit Court of Tuscaloosa County (R. 5, 6), in count 3, with having picketed the works of the Brown Wood Preserving Company, Inc. "for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise" of that company, and was convicted as charged in the complaint (R. 8).

The Legislature has definitely qualified the picketing which it prohibited. In so doing, the statute crystallizes into canon law not only the best considered opinions of the best courts but the common law rule as well. (See Brandeis dissent in Truax v. Corrigan, infra). The Legislature recognized the conclusion which was reached by Messrs. Frankfurter (now Mr. Justice Frankfurter of this court) and Green in their work entitled "The Labor Injunction" (p. 25) that:

> "The damage inflicted by combative measures of a Union—the strike, the boycott, the picket—must win immunity by its purpose."

This conclusion is based upon the fundamental principle that no right is so absolute that it may be

exercised under any circumstances and without any qualification but, in all instances, such rights must be exercised with reasonable regard for the conflicting rights of others. As stated in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254:

> "The familiar maxim, Sic utere tuo ut alienum non laedas—literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure the rights of another,' (Broom's Leg. Max., 8th ed., 289)—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it. And a most familiar application is the action for enticing an employee, in which it never was a justification that defendant wishes to retain for himself the services of the employee. 1 Black. Com. 429; 3 Id. 142."

And as said by Mr. Chief Justice Waite, speaking for this Court in the case of *Munn v. People of Illinois*, 94 U. S. 113, at 123, 124,

> "The Constitution contains no definition of the word 'deprive,' as used in the 14th Amendment. To determine its signification therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

"While this provision of the Amendment is new in the Constitution of the United States as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the 5th Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the National Government, and by the 14th, as a guaranty against any encroachment upon an acknowledged right of citizenship by the Legislatures of the States.

"When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament and, through their State Constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the

powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good.' *This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. R. Co., 27 Vt., 143, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim Sic tuo ut alienum non laedas. From this source come the police powers, which, as was said by Chief Justice Taney in the License Cases, 5 How., 583, 'Are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these*

powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. * * *" (Emphasis supplied)

In an effort to ascertain whether Section 3448 is a fair, reasonable and appropriate police regulation of the relative rights of capital and labor we have made every effort to read most of the vast amount of conflicting judicial decisions treating labor disputes. The greatest portion of these decisions are found in the multitudinous injunction proceedings which have been filed throughout the United States since the middle of the Nineteenth Century. Numerous decisions are found holding that "picketing" is per se unlawful and, indeed, this seems to be the conclusion uniformly reached by the federal courts. Other decisions permit picketing if "peaceful." Still others find a middle ground, etc. See "The Labor Injunction" by Frankfurter and Green, "The Fiction of Peaceful Picketing", by Frank E. Cooper, Michigan Law Review, Vol. 35, November, 1935, No. 1.

Also 48 Yale L. J. 308;

33 Columbia L. R. 1188;

38 Columbia L. R. 1519;

15 Texas Law Review No. 3, page 314;

L. R. A. 1981C, 277, 282;

6 A. L. R. 894, 909, 928 et seq;

27 A. L. R. 642, 651, 654, et seq;

35 A. L. R. 1194, 1200;

83 A. L .R. 193, 201;

92 A. L. R. 1450, 1471;

97 A. L. R. 1318, 1333, 1350;

122 A. L. R. 1043.

Above this apparent maelstrom of legal and economic theories advanced by those who have considered the question here presented there has always stood out one fundamental principle—agreed on by all courts and all economic theorists—that the right of one group to organize for the advancement of its own ends is exactly equal to but not greater than the right of other citizens peaceably to pursue their own lawful occupations. Wherever there is conflict between such rights it is held that recourse must be had to the fundamental tenet "sic utere tuo ut alienum non laedes."

The Fourteenth Amendment, it is true, guarantees freedom of speech and freedom of the right of assembly. Yes—but not freedom to say whatever one pleases regardless of the injury to others—not the freedom to speak a libel of another tending to provoke a breach of the peace—not freedom to defame the character of a woman imputing to her a want of chastity—not freedom to accuse another

falsely of committing a felony or other indictable offense involving moral turpitude—but the freedom to advance, by word of mouth, one's own cause,—to criticize, yes—to communicate information and opinion, yes—but not to deliberately and maliciously injure another.

Every person, it is asserted has the right to be free from arbitrary personal restraint or servitude but one who is prevented from injuring another cannot justly assert that he has himself been deprived of any right, for when one becomes a member of society he necessarily parts with some privilege which, as an individual not affected by his relations to others, he might merit.

Munn v. Illinois, 94 U. S. 113, 123, supra.

We have made an intensive search of the state decisions and find that they have, without exception, echoed and re-echoed this sentiment that the damage inflicted by a picket must win immunity by its purpose. For the convenience of the court we herewith list the leading cases from the several states in the Union which have dealt with the subject, with appropriate quotations therefrom, all indicative of the propriety and reasonableness of the regulation adopted by the Legislature of Alabama, to wit, Section 3448 of the Code of Alabama, 1923, which limits picketing only where the purpose theerof is to injure another.

The Supreme Court of Arkansas has treated the question in the leading case of *Local Union No.* 313.

Hotel and Restaurant Employees International Alliance v. Stathakis, 135 Ark. 86, 205 S. W. 450, 452, as follows:

> "The labor union or its representatives and employes had the right to exhibit the placards in question to the public; but it is a far different thing to say that the right to exhibit these placards to the public carried with it the right to so patrol or picket appellee's places of business with these placards as to interfere with his lawful business. The cases all agree that the right to carry on a lawful business without obstruction is a property right, and one which the courts have never hesitated to protect, and its protection is a proper object for the granting of an injunction.
>
> "The placard itself may be lawful and its display, therefore, not unlawful; yet, with the use of such a placard, or, for that matter, without the use of any placard, one's right to prosecute his own lawful business may be unnecessarily interfered with. *The legality of the inscription on the placard* and *the right to display such a placard did not give one the right to make any use he pleases of the placard.* It is commonly said that one may do as he pleases with his own; but that is not an exact statement of the law. *He cannot so use his own as to inflict unnecessary injury upon another.* This truth is so just and so apparent that early in the history of our law the maxim grew up, 'Sic utere tuo ut alienum non laedas.' This maxim

was quoted and translated by Mr. Justice Pitney in the case of Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260, where it was said:

"'The familiar maxim, "Sic utere tuo ut alienum non laedas" literally translated, "So use your own property as not to injure that of another person," but by more proper interpretation, "so as not to injure the rights of another" (Broom's Legal Maxims 8th Ed. 289) applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it.'

"This quotation was used in the case cited in a discussion of the relative rights of the employer and the employe wherein the right of the employer was unheld to discharge the employe for joining a labor union. In that case, as in an infinite number of others, it was recognized that rights are reciprocal, and so are duties. But the occasion may arise when rights are conflicting. I have the right to use the sidewalk and any portion thereof and at all hours, subject to necessary police regulations. But so has my neighbor. My right qualifies his, and his right qualifies mine, so that each must exercise his right in a manner not to interfere unnecessarily with the rights of the other. So here the strikers and the union to which they

belonged and the employes thereof had the right to give notice to the public that appellee's cafes were open shops, and therefore unfair to union labor; but, in doing this, they had no right to exercise coercion resulting from the conduct herein set forth. *They were not using the streets* in front of appellee's place of business *for the ordinary purposes for which streets and sidewalks are intended, but were using them for the avowed purpose of injuring his business or driving away the patronage which the public might otherwise have given him.* Their interference with his business was direct and immediate, and was intended so to be." (Emphasis supplied)

The Supreme Court of California has reached a similar conclusion holding that "peaceful picketing" is lawful if its purpose is the "lawful effort of the picketers to promote their own welfare".

J. F. Parkinson Co. v. Building Trade Council, 154 Cal. 581, 603, 604, 98 P. 1027, 1036.

And in *McKay v. Retail Automobile Salesmen Local No.* 1067, 89 P. (2) 426, 433, the California Court says:

"Peaceful picketing is not lawful if it is expressly prohibited by law or is conducted for an unlawful purpose."

The Court of Chancery of Delaware in *Sarros v. Nouris*, 15 Del. Ch. 391, 138 A. 607, has concluded that:

"If the strike was solely to injure the complainants in their business, it was according to all the authorities illegal, and any picketing or other activities designed to promote it should be enjoined. *** They must have had some purpose which in their opinion justified them as a matter of self advancement in inaugurating against the complainants a strike campaign which must necessarily result in their serious pecuniary loss. Unless such a motive is found, the defendants are in the unenviable position of wantonly inflicting injury upon another to his great damage without corresponding benefit to themselves."

The Florida Supreme Court in *Paramount Enterprises, Inc. v. Mitchell*, 104 Fla. 407, 140 So. 328, 332, has enunciated a similar rule, holding that:

"No man or set of men with real personal interests to serve and not legitimate interests to protect, may, by malicious means destroy the business of another."

The Supreme Court of Georgia in *McMichael v. Atlanta Envelope Co.*, 151 Ga. 776, 108 S. E. 226, 229, adopts the rule established by the Supreme Court of Illinois in *Barnes v. Typographical Union*, 232 Ill. 431, 436, 83 N. E. 945, concluding that:

"It must be conceded that *argument and persuasion are lawful if not directed to the accomplishment of an illegal and unlawful purpose* * * *. An act which is naturally innocent,

when done with actual malice for the purpose of injuring another and followed by such injury, is not excused because the act might be innocent under other conditions." (Emphasis supplied)

In a more recent case the Supreme Court of Illinois has reiterated the doctrine stating:

"*The law is that, if the primary purpose is a malevolent one to injure the employer or his business, the object is unlawful,* whether it is accomplished by mere persuasion or by physical violence (A. R. Barnes & Co. v. Chicago Typographical Union, supra), but, where the primary object of the combination is to further the interests of the organization and improve and better the conditions of its members, whatever injury may follow to others is merely incidental. * * *.

"* * * *we have given sanction to the doctrine that, when the object of a strike is unlawful any act in furtherance thereof is also unlawful,* and that, when the acts of strikers, although unaccompanied by violence or threats, are such an annoyance to others as to amount to coercion or intimidation, they are unlawful. *To that effect is Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918 B, 461." (Emphasis supplied)

Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, cert. den. 295 U. S. 734.

In a case decided May 16, 1939, the Supreme Court of Indiana reiterated the rule which was previously adopted in *Karges Furniture Co. v. Amalgamated Wood Workers Local Union No.* 431, 165 Ind. 421, 428, 75 N. E. 877, 879, that, whereas, peaceful picketing for the purpose of informing the public of the nature of the Union's difficulty was legal, the activities of a picketer singly or with others, "not to better himself but to injure his rival" is an "actionable wrong."

Weist v. Dirks, 20 N. E. (2d) 969, 972.

In a leading Iowa case, *Ellis v. Journeyman Barbers' International Union of America, etc.*, 194 Iowa 179, 191 N. W. 111, 113, the Supreme Court of Iowa observes:

> "Conduct directly affecting his employer to his detriment by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain."

The Court of Appeals of Kentucky, citing numerous cases in support of its conclusion, adopts the following rationale:

> "Labor has the recognized legal right to acquaint the public with the facts which it regards as unfair, to give notoriety to its cause and to use persuasive inducements to bring *its own policies* to triumph. Such picketing or pub-

licity is not per se unlawful." (Emphasis supplied)

And the court concludes that if the purpose is not to advance "its own policies", the picketing must be held unlawful.

> Music Hall Theater v. Moving Picture Machine Operators Local, 249 Ky. 639, 61 S. W. (2d.) 283, 285.

In *Hughes v. Kansas City Motion Picture Machine Operators Local No.* 170, 282 Mo. 304, 221 S. W. 95, certiorari denied 254 U. S. 632, error dismissed, 257 U. S. 621, the Supreme Court of Missouri states:

> "The privilege of free movement on the streets and of free speech belonged to defendants, but not to the extent that they may be exercised (*for no legitimate purpose of defendants*) in a place and manner and *with the intention to annoy and damage plaintiffs.*" (Emphasis supplied)

In Massachusetts, the rationale for decision shifts almost completely to an emphasis upon the issue of justifiable ends. The analysis for application is the one articulated in the classic dissent by Mr. Justice Holmes in *Vegelahn v. Guntner*, 167 Mass. 92, 104; and adopted by the majority in *Plant v. Woods*, 176 Mass. 492. Self-interest in its undefined amplitude is the end that justifies. Thus, the Massachusetts Supreme Court recognizes as legal a

strike for higher wages, shorter hours and improved shop conditions.

Cornellier v. Haverhill Shoe Manufacturers Association, 221 Mass. 554.

But a strike instituted to compel a Union shop to close is, according to the Massachusetts court of no "importance to these employees in reference to their benefit or comfort or other direct interest as employees."

Martineau v. Foley, 225 Mass. 107;

W. A. Snow Iron Works, Inc. v. Chaywick, 227 Mass. 302.

Also see Harvey v. Chapman, 226 Mass. 191, 115 N. E. 304.

The Supreme Court of New Hampshire has also had occasion to consider the question and in the case of *White Mt. Freezer Co. v. Murphy*, 78 N. H. 398, 107 A. 357, the court stated:

"The defendants are called upon to justify their action (picketing activities around the plaintiff's plant) * * *. Interference with the right of another without justification is unreasonable, whether the motive of the strikers was an honest effort to benefit themselves or a malicious intent to injury the plaintiffs' company. That they refused to aid in compelling other workers to join the defendant's Union is a question of fact upon which the case contains no evidence."

The New Hampshire court observed that:

> "The authorities are practically unanimous to the effect that the defendant is liable unless he shows a justification."

In *Grimes v. Durnin*, 80 N. H. 145, 114 A. 273, the court, in considering the actions of persons picketing a restaurant operated by the plaintiff, observed:

> "The picketers called out in a loud voice 'strike on at Grimes Lunch; unfair to organized labor; this restaurant on strike.' * * * Their (the picketers) real intention was to 'win the strike regardless of the effect upon the plaintiff's business, 'and, if injunction had not been served, they would have continued the strike until the plaintiff signed the agreement; * * * Upon these facts there can be no doubt that the court was authorized and justified in issuing an injunction. * * *"

The Court of Chancery of New Jersey in *International Ticket Co. v. Wendrich*, 122 N. J. Eq. 222, 193 A. 808, also adopts the general formula, concluding:

> "The object of the strike being unlawful, all acts in support thereof, including picketing, are also unlawful. Bayonne Textile Corporation v. American Federation of Silk Workers, supra, 116 N. J. Eq. 146, at page 161, 172 A. 551, 92 A. L. R. 1450; Elkind & Sons, Inc., v. Retail Clerks International Protective Associa-

tion, supra; Dorchy v. State of Kansas, 272 U. S. 306, 311, 47 S. Ct. 86, 87, 71 L. Ed. 248, 269; Toledo, Ann Arbor & North Michigan Railroad Company v. Pennsylvania Company (C. C.) 54 F. 730, 737, 19 L. R. A. 387. In Senn v. Tile Layers Protective Union, 57 S. Ct. 857, 867, 81 L. Ed..... Mr. Justice Butler said: 'But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned."

The New York Supreme Court has likewise adopted a similar view. In *National Protective Association v. Cummins*, 170 N. Y. 315, both majority and dissenters looked to the motives or purposes of the strikers and picketers in considering whether an injunction properly should issue. As the majority read it, there was "no pretense that the defendant associations * * * had any other motive than one which the law justifies of attempting to benefit their members by securing their employment." See 170 N. Y. 327. The dissenting judges observed that "the object of the defendants was not to get * * * better terms for themselves, but to prevent others from following their lawful calling."

The Supreme Court of Rhode Island likewise condemns picketing where the "primary and plain object of the picketers was to injure complainant's business" rather than to advance their own interests.

Bomes v. Prov. Local Union No. 223, 51 R. I. 449, 155 A. 581.

The Supreme Court of Tennessee in an elaborate consideration of the matter in *Lyle v. Local No. 452, Amalgamated Meat Cutters* etc., 174 Tenn. 222, 124 S. W. (2d.) 701, 703, joins the many other authorities in concluding that where the end is unlawful there can be no legal picketing.

In *Sheehan v. Levy*, 238 S. W. 900, the Commission of Appeals of Texas collates numerous Texas decisions holding that interference by picketers wantonly and maliciously, rather than to serve some legitimate purpose of their own, is unlawful. The court states:

> "A man may lawfully refuse to have business relations with another for any reason—on account of whim, caprice, prejudice or ill will. He may lawfully induce others to refrain from having business relations with such third person, though it injuriously affects such person, *provided his action be to serve some legitimate interest of his own.* * * * Our Supreme Court says that, if the Sheehan workers were withdrawn for no other purpose than to injure his business, the withdrawal was wrongful and therefore actionable." (Emphasis supplied)

The Supreme Court of Washington has taken a similar attitude toward picketing, the object of which is not the advancement of the picketer's cause but the intention to injure the person or persons picketed.

Danz v. American Federation of Musicians, Local 76, 133 Wash. 186, 233 P. 630;

Safeway Store, Inc. v. Retail Clerks Union Local 148, 184 Wash. 322, 52 P. (2d.) 372;

Farnili v. Auto Machinists Union Local 297, 93 P. (2d.) 422.

Other decisions indicative of a similar attitude on the part of other state courts are *State v. Howart*, 109 Kan. 376, 198 P. 696, error dismissed 258 U. S. 181; *Medford v. Levy*, 31 S. C. 699, 8 S. E. 302; *In re: Langell*, 178 Mich. 305, 144 N. W. 841, (Here the court observes that 'the later and more reasonable rule, however, holds that all picketing is illegal. It is interesting to note that the decision was rendered on January 5, 1914.); *International Pocketbook Workers Union v. Orlove*, 158 Md. 496, 148 A. 826.

Additional judicial precedent is to be found in the decisions of this Court. In *Duplex Co. v. Deering*, 254 U. S. 443, 473, 474, the court concluded that the institution of a strike against an employer who is at peace with his own employees solely to compel such employer to withdraw his patronage from the plaintiff with whom there was a dispute "cannot be deemed 'peaceful and lawful' persuasion."

In the recent case of *Senn v. Tile Layers Protective Union*, 301 U. S. 468, this court itself recognized the rule as settled:

"But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned."

Attention is here also directed to the fact that Alabama is a common-law State and was such at the time of the enactment of Section 3448 and its predecessor. Section 14 of the Code of Alabama of 1923 (Code of Alabama of 1907, Section 12) provides as follows:

"Section 14. Common law of England, adopted.—The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this State, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature."

At common law a conspiracy to injure the public, or the practice of acts and teachings of doctrines with the intention or purpose to injure the public or any member thereof was undoubtedly a crime. See dissenting opinion of Brandeis, J., in Truax v. Corrigan, 257 U. S. 312, 354 et seq.

It thus appears that when the Legislature of Alabama found themselves called upon to enact legislation to protect the public welfare against the well-known evils which arise from unregulated picketing of certain types, that body, while recognizing the essential principles that our economic system is founded upon the doctrine of free competition, that

large aggregations of capital are not inconsistent with the doctrine of free competition but are indeed inevitable and socially desirable, and that the individual members must combine in order thereby to achieve the possibility of free competition with concentrated capital, necessarily concluded, in the light of all the foregoing judicial precedents and the rule at common law which was already part and parcel of the State system of law, that this combination of workers and their activities should be for their *own* advancement and not for the destruction of capital.

Can it be seriously contended then that the legislation which assures such a balance of rights is without justification?

The appellate courts of California, Texas and Indiana long ago answered this question by expressing their approval of ordinances and statutes seeking to maintain such a balance.

In the *Matter of Williams*, 158 Cal. 550, the court stated:

> "* * * the prisoner was charged in the information with two distinct offenses, as defined by the ordinance: 1. With 'loitering' on a public street in front of the Fulton Engine Works for the purpose of inducing and influencing persons to refrain from doing and performing services and labor at said works; 2. With 'picketing' in front of said works for the purpose of intimidating, threatening, and coercing such persons. It is argued in support of the petition that the

ordinance is invalid. As to the provision concerning 'picketing' for the purpose of intimidation, threatening, etc., I have no doubt that it is a valid exercise of the powers of the local legislature."

In *Ex Parte Stout*, 82 Tex. Cr. 183, the Texas Appellate Court had this to say:

"The ordinance is not unreasonable, nor is it vague, uncertain, etc., so that it can not be understood. The ordinance seems clear, plain and easily understood. Instead of being unreasonable it is most reasonable, under the circumstances. Authorities above are quoted which show that the acts of relator which are denounced by said ordinance were clearly intended to intimidate and coerce all union labor folks and their sympathizers and others, from going into said restaurant or cafe and getting their meals or having any other business transaction with the owner or proprietor thereof. In other words, to injure and break up the proprietor in business. Such conduct as his would necessarily lead to disturbances, and had a tendency to intimidate and prevent all persons from entering said restaurant and would naturally injure the proprietor in his business. There can be no doubt but that the proprietor or owner of said restaurant had a right to conduct his business to suit himself and to employ union or non-union laborers as suited him and no one has the right to injure or disturb his business because he so chose to run it. The

fact that his restaurant abutted upon the portion of the sidewalk where the relator was undertaking to injure and disturb him and his business of itself would give him some rights. It was the duty of the City of El Paso by such an ordinance to protect him in the conduct of his business, otherwise the city would not have been doing its duty to him and other citizens 'to preserve and enforce good government, order and security of the city and its inhabitants, and to protect the lives, health and property of its inhabitants.'"

In *Thomas v. City of Indianapolis*, 195 Ind. 440, the Supreme Court of Indiana considered the question with the following result:

"Appellants assert that the ordinance in question is violative of many provisions of the state and federal Constitutions.

"In this connection, appellants make the following contentions: That it violates the Fourteenth Amendment to the Constitution, in that it abridges the privileges and immunities of appellants as citizens, * * *.

"Most of these contentions of appellants rest upon the same argument and which would seem to be founded upon the false premise that any regulation of society which is made for the general good is invalid if it prohibits a person from doing what he would otherwise have a right to do. At least most of their argument

would apply to practically all regulatory laws and ordinances which have been passed under the police power, to promote the public peace, safety and welfare.

"That the rights of the individual are subservient to the welfare of the general public is uniformly recognized by the courts. As was said by the Supreme Court of the United States, in *Jacobson v. Massachusetts* (1904), 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann Cas. 765; 'This court has more than once recognized it as a fundamental principle, that, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the Legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." ' * * * *

"This ordinance does not prevent employees from striking, nor does it prevent them from presenting their side of the controversy with their employer to others. It prohibits some acts that are inherently wrong and other acts which are not wrong within themselves, are regulated and only prohibited from being committed under such circumstances and in such places as may result in public disorder and cause breaches of the peace."

In a very recent case from the State of Wisconsin, *Wisconsin Employment Relations Board v. Allen Bradley, Local etc.* (unreported) the Circuit Court of Milwaukee County, in an elaborate opinion, after considering applicable state and federal decisions on the question, upheld the validity of a similar "balancing statute". In considering Section 111.06 (2) (a) (f) of the Wisconsin "Employment Peace Act", which the court states "is not intended to declare all mass picketing to be unlawful," but is expressly limited in its application to cases tending "to hinder or prevent * * * the pursuit of any lawful work or employment,' " the court therein states that:

> "The end sought to be accomplished is prevention and avoidance of unlawful means and the application of force and coercion."

It appears, therefore, that the Legislature of the State of Alabama has made a choice between well established precedents laid down on either side by some of the strongest courts in the country. We, therefore, cannot believe that this court will say that the State was acting arbitrarily or unreasonably when, in the exercise of its judgment, it determined from these decided cases, as well as the common law of the State, that the action of actively and directly interfering with, and preventing, the operation of the lawful business of another was an unlawful act, and enacted legislation prohibitory of such action. Cf. the observation of Justice Brandeis in his dissent in the case of *Truax v. Corrigan*, 257 U. S. 371, 372.

2.

Section 3448 Of The Code of Alabama, 1923, In Its Application To This Petitioner Has Not Deprived Him Of The Rights Of Freedom Of Speech And Assembly Guaranteed By The Fourteenth Amendment To The Constitution Of The United States.

It is earnestly submitted that there is no merit in petitioner's contention that his conviction was without due process of law, in that, his right of freedom of speech was violated.

We do not dispute that freedom of speech and the right of peaceful assembly are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. This, we believe, is firmly established by this court in the case of *De Jonge v. Oregon*, 299 U. S. 353, 364. We do not believe that the petitioner will seriously contend that the freedom of speech and the right of assembly which is secured by the Constitution, is an absolute right to speak or assemble, without responsibility, whatever and wherever one may choose, or an unrestricted and unbridled license which gives the immunity for every possible use of language or of right of assembly and prevents the punishment of those who abuse this freedom. This Court in *Gitlow v. New York*, 268 U. S. 652, 667, recognized the fallacy of any such contention stating:

"Reasonably limited, it was said by Storey (2 Storey on the Constitution, 5th Ed. Section 1580, p. 634) this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic."

What then is petitioner's position in this matter? In brief filed he asserts (petitioner's brief, p. 16) "the criminal misconduct for which the petitioner was convicted consisted of requesting his fellow worker not to return to work until a strike was settled." We do not believe that this is a fair statement of the matter. As hereinbefore shown, petitioner was charged with the offense of picketing "for a purpose condemned by the statute." The Court of Appeals held that the evidence was sufficient to show this petitioner guilty of the offense charged. Petitioner was not convicted for his words alone. The conviction must necessarily have rested upon the fact that he was a member of a picket line, gathered about the premises of the Brown Wood Preserving Company for the purpose, not of advancing their own interests, but of wilfully injuring the company, its property, and interests.

We are now confronted, therefore, with a picture wherein the freedom of speech right conflicts with the property right and in the same case; and it is asserted and argued that by reason of the opinions of this Court in the freedom of speech and freedom of the press cases, this Court is committed to a policy which in effect makes the freedom of speech right inviolate, or that the right of freedom of speech

is of such paramount importance that it may even destroy the property right and in cases where the two rights clash with each other. We respectfully submit that the freedom of speech right by reason of the absorptive process (See Gitlow v. New York, 268 U. S. 652) may have become a right of basic importance, but that this right should be subject to the same reasonable limitations and the same tests as have been put by this Court on the property right; and that when the Legislature of Alabama in effect treated both rights on an equal basis and said that where they clash each must give way to the other, that expression did not violate the due process clause of the Fourteenth Amendment. Cf. *Houston etc. Lines v. Local Union No. 886 etc.*, 24 F. Supp, 619, 633, where it is stated:

> "So the question * * * what is lawful and what is unlawful picketing and peaceful persuasion * * * rests, not with the courts but the legislative bodies."

The decision of this court in *De Jonge v. Oregon*, 299 U. S. 363, while undoubtedly sound, must be read in connection with the Oregon statute there under consideration which prohibited the holding of any meeting or the speaking of any word advocating or teaching the doctrine of criminal syndication etc. The court concluded that the broad reach of the statute would cover a speaker who assisted in the conduct of such a meeting; that however innocuous the object of the meeting, however lawful the subjects and tenor of the address, however reasonable and timely the discussion, all assisting in the conduct

of the meeting would be subject to imprisonment as felons if the meeting was held by the Communist Party. Section 3448 of the Alabama Code clearly permits of no such references. If a person speaks in support of his own rights and for the purpose of advancing his own cause, there is no offense under Section 3448. An assembly for the lawful purpose of peaceful action is not prohibited by Section 3448. If, on the other hand, a member of a picket speaks for the purpose of injuring another or if the picket assembles unlawfully and in a threatening manner, the speaking and the assembling become unlawful.

As was stated by this court in the case of *Robertson v. Baldwin*, 165 U. S. 275, 281:

> "* * * the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; * * *"

The following observations of Mr. Justice Lamar in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439, also are here particularly applicable:

> "Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made *it is the duty of government to protect the one against the many as well as the many against the one.*
>
> "In the case of an unlawful conspiracy, *the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force*

not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction." (Emphasis supplied)

Petitioner further asserts that an examination of the facts in the case of *O'Rouke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, cer. den. 232 Ala. 355, 168 So. 209, will show that Section 3448 is being ruthlessly applied in Alabama to protect the economic interests of the employer against the Union rights of the employee. We deem it unnecessary to offer argument in contradiction of this contention, for this court has many times stated that *if the assailed provisions of a statute, as construed and applied in the case before it, afford due process, then it cannot be complained that in earlier cases they were so construed and applied as to deny due process to other litigants.*

Atlantic Coast Line v. Ford, 287 U. S. 502, 505;

Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 278 U. S. 358;

Patterson v. Colorado, 205 U. S. 454, 460;

Brinkenhoff-Faris Co. v. Hill, 281 U. S. 673, 680;

Dunbar v. New York, 251 U. S. 516, 518; 519;

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 452;

Fleming v. Fleming, 264 U. S. 29, 31.

Thus, it will be seen that petitioner's insistence that in this particular case he was denied the liberties guaranteed him by the Fourteenth Amendment to the Constitution must be construed in the light of the facts which appear of record. Those facts have been set forth and commented upon at length in Part III of this brief. The courts have stated that the character of every act depends upon the circumstances in which it is done.

Schenck v. United States, 249 U. S. 47, 52;

Aikers v. Wisconsin, 195 U. S. 194, 205, 206.

Thus, it has been held that the most stringent protection of free speech would not protect a man from an injunction against uttering words which might have all the effect of force.

Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439;

Jacobson v. Massachusetts, 197 U. S. 11.

It is submitted, therefore, that since it clearly appears from the record that the petitioner was a

member of a picket line located very close to the place of business of his former employer and since it further appears that petitioner was a member of a group of picketers consisting of a relatively large number, considering the location of the picket and the number of employees of the plant, it must be concluded that the picket was not a "peaceful picket" within the meaning of the authorities cited by counsel for petitioner, but rather that such picket was an offensive and unjustifiable annoyance calculated to bring about public disturbance and breaches of the peace and that the petitioner, being the champion of only his own rights, cannot now be heard to invoke the jurisdiction of this court to declare unconstitutional a statute which did not prohibit him from striking or presenting to others his side of the controversy, but only prevented him from acts inherently wrong.

Let us now consider what the result would be if petitioners' asserted right was sustained. The affect of their argument is that they ask this Court to hold as a substantive rule of law all picketing activities conducted as a means of enforcing a strike should be sustained under the freedom of speech guarantees of the due process clause. They say that the guarantee of "freedom of speech" gives them the right to maintain picket lines for the purpose of disseminating information, regardless of whether or not the means thus used are used to accomplish a lawful or unlawful end, and in spite of the public policy as declared by legislature or stated by the courts to be the common law of a State. They further say that the freedom of speech right is so inviolate

that it can and should destroy the property right when the two conflict, which conflict invariably appears in cases involving labor disputes. The petitioners are therefore asking for a declaration of a national policy by this Court. To all intents and purposes they ask this Court to declare that picketing is a lawful means to an end throughout the United States and in each and every State thereof under the guarantee of "freedom of speech" found in the due process clause of the Fourteenth Amendment, even though both the means employed and the end sought to be attained are unlawful by the law of the State. It is respectfully submitted that the court can reach no such conclusion.

D.

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IS NOT VOID FOR INDEFINITENESS.

It is insisted that Section 3448 is void in that it fails to inform a defendant of the nature of the offense with which he will be charged and is, therefore, violative of the Fourteenth amendment to the Constitution. In the case of *Whitney v. California*, 274 U. S. 357, 368, this court reannounces the essential requirement of due process, that a penal statute must be "sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties," and be couched in terms that are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." The

statute here involved particularly condemns the offense of picketing when carried on under certain circumstances. It would be absurd to argue that the term "picketing" is in and of itself so indefinite and vague as to prevent an understanding of its true import by men of common understanding. The cases which we have cited, supra, in this brief reiterate the conclusion that the act of picketing has a well defined meaning. The statute specifically states under what circumstances such picketing shall be unlawful, to wit, when it is conducted "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another." In no sense of the word can it be contended that the act is not sufficiently explicit to inform those who are subject to it of the conduct which will render them liable to its penalties. This statute presents no greater uncertainty or indefiniteness in application to necessarily varying facts than has been repeatedly sanctioned by this court.

Nash v. United States, 229 U. S. 373, 377;

Miller v. Strahl, 239 U. S. 426, 434;

Burns v. United States, 274 U. S. 328.

E.

THE APPELLATE COURTS OF ALABAMA HAVE NEVER HELD ALL PICKETING REGARDLESS OF ITS PURPOSE, TO BE PROHIBITED BY THE ALABAMA PENAL STATUTES.

Counsel for petitioner in brief filed in this court insists that the courts of last resort of this State have specifically held that Section 3448 of the Code of Alabama, 1923, requires such a construction as will compel this court to declare it unconstitutional. The case of *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657, which is made the basis of petitioner's contention, it is true, contains an indication of the court's attitude toward the construction of the statute then before it. It is to be noted, however, that the section under consideration by the court in the Hardie-Tynes case was Section 6395 of the Code of Alabama of 1907, while the section now before this court for construction is Section 3448 of the Code of Alabama of 1923, which has been extensively amended as will appear from a comparison of the two sections which are set out, infra, for consideration of the court.

"Section 3448. Loitering or picketing forbidden. —Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, ing, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

"Section 6395. Unlawful to interfere with trading by others. — Any person or persons who go near to or loiter about the premises or place of business of any person, firm, or corporation engaged in a lawful business, for the purpose of influencing, or inducing others not to trade with, buy from, sell to, or have business dealings with such person, firm, or corporation, or to picket the works or place of business of such other person, firm or corporation for the purpose of interfering with or injuring any lawful business or enterprise, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

It is to be noted also that, although the court holds that the effect of Section 6395, when considered with the other code sections cited, is that there can be no such thing as "peaceful picketing or peaceful persuasion," the court did not have for consideration at that time a case of "peaceful picketing or peaceful persuasion." The reported decision clearly reflects that threats, intimidation and violence were

made the basis of the proceeding. The statement of the court is clearly dicta and there is no indication that it will be again adopted without limitations. Since the Hardie-Tynes decision, the Supreme Court of Alabama has never expressed itself other than by the mere denying of certiorari in this case and in the O'Rouke case which has been treated, supra.

F.

CASES CITED BY PETITIONER

The cases cited by petitioner, *C. I. O. v. Hague*, 307 U. S. 496; *Senn v. Tile Layers Union*, 301 U. S. 468; *De Jonge v. Oregon*, 299 U. S. 363, and *People v. Harris*, 91 P. (2d) 993, are readily distinguishable. The case of C. I. O. v. Hague did not deal with a question of picketing. We do not dispute the statement contained therein, which is quoted by petitioner at page 13 of his brief, but if the case is cited as authority for petitioner's contention that Section 3348 is unconstitutional, we feel that the court will at once recognize the inapplicability of the citation.

Involved in the Hague case was a regulatory ordinance which forbade the doing of certain things except by permission of certain municipal officers. The statute here is not regulatory. It is a criminal prohibitory ordinance. It does not call for the issuance of permits by anyone.

Nor do we deny the soundness of the quotation from Senn v. Tile Layers Union. While it is to be

noted that Mr. Justice Butler states that the right to strike or picket peacefully "to better their condition," does not infringe any right of the employer, nowhere in the opinion is it intimated that if the purpose is not to "better the condition" of the workers but to injure the employer, the strike or the picket are justifiable. Indeed, as we have quoted, supra, a specific condemnation of any such action is set forth in Mr. Justice Butler's opinion.

The De Jonge case involved a statute specifically directed against speaking and the facts presented to this court clearly reveal the inapplicability of the citation. We have discussed this case elsewhere in the brief and we do not feel that it merits further discussion here.

Nor can petitioner find consolation in the recently decided cases involving the question of certain regulations, embodied in the municipal ordinances considered, abolishing the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment to the Constitution.

Schneider v. State of New Jersey;

Young v. State of California,

Snyder v. City of Milwaukee;

Nichols & Thompson v. Commonwealth of Massachusettts.

Nos. 11, 13, 18 and 19—October Term, 1939.

(MS), decided November 22, 1939.

These cases merely confirm the undoubted right of every citizen to freely communicate *information and opinion* and condemn ordinances limiting or licensing this freedom of communication. We do not here argue that Section 3448 would be constitutional, if it prohibited such free communication. We merely insist that the purpose of the communication of such *information and opinion* cannot be the injury of another, and that Section 3448 is directed to securing this end and this end only.

The distinction between the several cases heretofore decided by this Court treating the guarantee of the right of freedom of speech to the parties involved and the present case is found in the case of *Lovell v. City of Griffin*, 303 U. S. at page 451, wherein this court, after stating that the ordinance of the City of Griffin is comprehensive in that its character is such that it struck at the very foundation of the freedom of the press by subjecting it to license and censorship, the court concludes:

> "It (the ordinance) is not limited to ways which might be regarded as inconsistent with the maintenance of such order * * *."

In the instant case the Legislature of Alabama has determined that where picketing is carried on for purposes such as that condemned by the statute, the obvious effect would be to create disturbances of the peace and general public disorder, and in an effort to prevent these disturbances in the protection

of the public welfare, the Legislature in its wisdom has prohibited picketing under such circumstances. Cf. *Buxbom v. City of Riverside*, 29 F. Supp. 3 (D. C. S. D. Calif.)

We believe the case of People v. Harris to be here inapplicable for two reasons. First, the court in that case was considering picketing which was "carried on without intimidation or coercion" and picketing wherein the methods employed "did not involve fraud, violence, breach of the peace or threat thereof nor did such persons commit any act or acts tending thereto," while here, as we have shown, the atmosphere was one of intimidation and threat of violence. Second, the decision is, as described by Justice Bakke of the Colorado court, one of "a mountain laboring and bringing forth a mouse" and at that, a mouse which is "too grey and not recognizable in the dark." The State of Colorado, it will be noted, had adopted a statute providing against the issuance of injunctions prohibiting acts similar to those declared illegal by the statute. Justice Bakke states that this latter act impliedly repealed the criminal statute "to the extent that peaceful picketing in a labor dispute is no longer a crime." This treatment of the matter he bases on a similar conclusion reach by the Supreme Court of Wisconsin in *American Furniture Co. v. Chauffeur's Local*, 222 Wis. 338, 358, 258 N. W. 250, 258. Attention is also called to the case of *Local Union No. 26 etc. v. City of Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624, in which the Supreme Court of Indiana reached a similar conclusion. It thus appears that the decision of the Colorado Supreme Court was, in a measure, col-

ored by the expressed legislative policy of that State, and, therefore, should not be here considered as persuasive authority.

Many other cases are cited by petitioner in his brief at pages 9, 10, and 11. We have examined each of these cases and find that in none of them is it stated that a State in the exercise of its police power may not regulate picketing activities or prohibit them when they are carried on, not for a lawful purpose but in such manner as to clearly constitute an unlawful and unjustifiable interference with the property rights of another, and thus calculated to bring about public disturbances injurious to the great body of the people.

The case of *City of Reno etc. v. State of Nevada etc.* set forth in the appendix to counsel's brief, also recognizes the fundamental rule that peaceful picketing is characterized by "peaceful persuasion for the promotion of a *lawful purpose.*" See petitioner's brief, pages 33, 36 and 37. The Alabama statute has stated that where picketing is carried on for the purpose of "hindering, delaying or interfering with or injuring any lawful business or enterprise of another" it shall be unlawful. The *purpose* being unlawful, it cannot be contended that the picketing here involved was lawful. In the Nevada case the court concluded that Sections 2 and 4 of the statute set out at pages 29 and 30 of petitioner's brief were unconstitutional. The court concluded that these sections "do not seek to merely regulate picketing * * * forbidding picketing under circumstances claimed to be unlawful, tortious or inequitable, or

containing other regulations designed to reasonably control picketing. They go beyond regulation. They are a sweeping prohibition of any form of picketing irrespective of its nature, *purpose* or number of pickets * * *."

It is, therefore, respectfully submitted that the cases cited by petitioner, far from being conclusive on the point, have been shown to be in full accord with the principles which we have maintained should control the decision in this cause.

CONCLUSION.

We conclude then that it having been shown that petitioner was not "peacefully picketing," but was picketing in a manner calculated to threaten and intimidate prospective employees of the Brown Wood Preserving Company, and it having further been shown that the courts hearing the evidence found that the petitioner was picketing for the purpose of hindering, delaying or interfering with or injuring the lawful business of the Brown Wood Preserving Company, petitioner cannot now be heard to complain that he was deprived of any rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States. We further conclude that, even assuming that the conduct of petitioner had been such as to permit him to here raise the constitutionality of Section 3448 of the Code of Alabama, 1923, such section must be here held constitutional since it is a reasonable and justifiable police regulation of the sovereign State of Alabama.

It is, therefore, respectfully insisted that this case should be affirmed.

Respectfully submitted,

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Attorney General of Alabama

WILLIAM H. LOEB,
Assistant Attorney General of Alabama,
For the State of Alabama.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 514

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA,

Respondent

SUPPLEMENTAL BRIEF FOR RESPONDENT.

THOS. S. LAWSON,
Attorney General of Alabama,

WILLIAM H. LOEB,
Assistant Attorney General of Alabama,

For the State of Alabama.

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IN THE

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OCTOBER TERM, 1939.

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BYRON THORNHILL,

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v.

STATE OF ALABAMA,

Respondent

SUPPLEMENTAL BRIEF FOR RESPONDENT.

This brief is respectfully submitted to this Court by and with the consent of the Court first had and obtained on, to wit, March 2, 1940.

The purpose of this brief is to supply the Court with authoritative answers to certain propositions raised by the Court from the bench during the course of the oral argument of this cause, for the State feels that in all fairness to the Court citations of authority should be made available to the Court with respect to these propositions which were not covered in the original brief.

I.

WHETHER THE PETITIONER WAS LOITERING *WITHOUT A JUST CAUSE OR LEGAL EXCUSE THEREFOR* WAS AN EXCULPATORY FACT, THE BURDEN OF PROOF OF WHICH WAS UPON HIM.

It is to be remembered that the petitioner in this case was charged with having offended Section 3448 of the Code of Alabama, 1923. That Section provides as follows:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

It will be noted that Section 3448 charges two offenses, first, going near to or loitering about the premises or place of business of another for the purpose or with the intent of infuencing, etc. other persons not to have business dealings with or be employed by such person and, second, picketing the works or place of business of such other person for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise of such other person. During the course of the oral argument, the question was raised with respect to whether or not the State had presented sufficient evidence to prove the first offense, to wit, that the Petitioner did go near to or loiter about the premises of another, etc.

The record, shows without dispute that petitioner, Byron Thornhill, was on the premises of the Brown Wood Preserving Company (R. 9, 10). We thus have a clear showing that petitioner did go near to or loiter about the premises or place of business of another person, firm or corporation.

The record next reveals that Thornhill approached one Clarence Simpson, a former employee of the Brown Wood Preserving Company, who was attempting to return to work in response to a notice posted by the company requesting their employees to return, and stated to him that "they were on a strike and did not want anybody to go up there to work" (R. 10). It appears that thereupon Clarence Simpson went away and did not attempt to return to work. It thus appears that a person was influ-

enced or induced by Petitioner not to be employed by the Brown Wood Preserving Company, for the law presumes that every person intends to do what he does and that the natural and probable consequences of his acts were intended.

Jacobs v. State, 17 Ala. App. 396, 85 So. 837;

Reid v. State, 18 Ala. App. 371, 92 So. 513;

Weeks v. State, 24 Ala. App. 198, 132 So. 870;

certiorari denied 222 Ala. 442, 132 So. 871;

Worrell v. State, 24 Ala. App. 313, 136 So. 737, cert. den. 223 Ala. 425, 136 So. 738.

It is submitted therefore that the State has met the burden of showing that Thornhill was loitering for the purpose of with the intent of influencing or inducing other persons not to be employed by the Brown Wood Preserving Company.

It is true that no evidence was presented by the State tending to show that Byron Thornhill was loitering or that he did go near to the premises of the Brown Wood Preserving Company "without a just cause or legal excuse therefor." It is submitted, however, that whether Thornhill was loitering with or without a just cause or legal excuse was an exculpatory fact, the burden of proof of which was upon the defendant rather than the State.

In a very early case (*Owens v. State*, 74 Ala. 401) the Supreme Court of Alabama, in a prosecution for trespass after warning under Section 4419 of the Code of Alabama of 1876, which provided that:

> "Any person who, *without legal cause or good excuse*, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so, is guilty of a misdemeanor, and, on conviction, must be fined not more than $100; and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than three months." (Emphasis supplied)

considered the question of whether the burden was upon the State to prove that the trespass had been done "without legal cause or good excuse." The court concluded that the following charge requested by the defendant was rightly refused:

> "The State must show by the whole evidence, beyond a reasonable doubt, first, that the defendant had been warned, within six months next preceding the time that the State elected to proceed against the defendant, not to trespass upon McCall's land; second, that the defendant knowingly entered upon said McCall's land, and, third, *that he entered upon said McCall's land without a legal cause or good excuse.*" (Emphasis supplied)

Mr. Justice Stone, speaking for the Supreme Court of Alabama, concluded:

> "The third charge asked by defendant was rightly refused. If the act of warning, and trespass within six months afterwards was sufficiently proved, it was not necessary the State should go further and prove the act was done without legal cause or lawful excuse. This was defensive matter, the proof of which rested with the defendant, unless the testimony which proved the act proved also the excuse — Hadley v. State, 55 Ala. 31."

In a later case, *Bailey v. State*, 161 Ala. 75, 49 So. 886, the defendant was charged with having violated Section 4730 of the Code of Alabama of 1896, as amended by General Acts of 1907, page 636, providing as follows:

> "Section 4730. Any person, who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and *without just cause*, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured; and any person, who with

intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, *without just cause*, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service or to cultivate such land, or refund such money, or pay for such property *without just cause* shall be prima facie evidence of the intent to injure his employer or landlord or to defraud him." (Emphasis supplied)

It was contended that the Legislature should have defined "just excuse" for the reason that there was no criterion laid down by the statute by which one could regulate his actions so as to know that he was abiding by the law and it was argued that, in the absence of such a definition, the statute denied to the defendant due process of law.

The court, in treating this contention, concluded:

"It seems to us that, if the Legislature had attempted this, (a definition of "just excuse")

> the result would have been more restrictive upon the defendant than was the leaving of the determination of this question to court and jury; *for, 'just cause' is defensive matter brought forward by the accused,* necessarily depending, for sufficiency, upon the peculiar facts of each case and the wider the latitude in respect thereto the more advantageous the situation of the accused." (Emphasis supplied)

Numerous other cases have been decided by the appellate courts of Alabama, on similar propositions, a number of which are collated in the opinion of the Court of Appeals in *Folmar v. State*, 19 Ala. App. 435, 97 So. 768.

In the Folmar case the defendant was convicted of having violated Section 7423 of the Code of Alabama, 1907, which provided as follows:

> "Any person who sells or conveys any personal property upon which he has given a written mortgage, lien or deed of trust, and which is then unsatisfied in whole or in part, without first obtaining the consent of the lawful holder thereof to such sale or conveyance must, on conviction, be fined not more than $500 and may also be imprisoned in the county jail or sentenced to hard labor for not more than six months, one or both, in the discretion of the jury."

The defendant excepted to the following portion of the oral charge of the court:

"Now, then, the next question is that this must have been without obtaining the consent of the lawful holder thereof. And is there any evidence to show that W. B. Folmar & Sons consented to the sale of this cotton. My understanding of the rule of law is that the question of consent would be upon the defendant; if he had the consent of W. B. Folmar & Sons, it would be his duty to show that he had the consent, and it is not necessary for the state, to make out its case, to show by each member of the firm of W. B. Folmar & Sons' separately that they did not give their consent. I think, if the defendant had the consent of them, it would be be incumbent upon him, as a defense in the case, to show that consent."

The Court of Appeals, in treating the charge, states:

"The oral charge of the court correctly states the law. The burden was not upon the state to show that the holder of the mortgage did not consent to a sale of the mortgaged property. The state, having proven the mortgage, the existence of the debt, and the sale of the mortgaged property by the defendant, discharged the burden resting upon it, and the burden was then on the defendant, if he relied upon that defense, to introduce evidence to show that the mortgagee consented to a sale of the mortgaged property. In the case of Freiberg v. State, 94 Ala. 91, 10 South. 703, the defendant

was convicted for selling or giving liquor to a minor without the consent of the parent, or the person having the management or control of the minor. The court held that the burden was on the defendant to prove the consent, and not the prosecution to prove the want of it. In a prosecution for unlawfully riding on a train without the consent of the train operators, it was held that the burden of proving the negative averments that the defendant was not in the employ of the railroad company, and that he was riding without authority from the engineer or conductor, was not upon the state; such facts being peculiarly in the knowledge of the defendant. Gains v. State, 149 Ala. 29, 43 South. 137.

"In prosecutions for engaging in certain occupations without a license, where a license is required, it has been held that it does not devolve on the state to show that the defendant had no license, but on the defendant to show affirmatively that he had. Bibb v. State, 83 Ala. 84, 3 South. 711; Porter v. State, 58 Ala. 66. The general rule is that:

> " 'Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' Farrall v. State, 32 Ala. 557; Greenleaf on Ev. (16th Ed.) p. 154, Section 79."

It is submitted, therefore, in view of the above quoted authorities, that the Court of Appeals of Alabama was not in error in concluding that the evidence presented by the State justified the conviction of loitering under the statute, it being particularly noted that not only did petitioner not present evidence of just cause or legal excuse but on the contrary when, after having filed his motion to exclude the evidence because of the insufficiency thereof, he was queried by the Court with respect to whether he insisted upon this ground of the motion, replied, through counsel, that he did not do so in as much as it was necessary for him to be convicted in order to test the constitutionality of the statute (R. 13, 14).

II.

IF THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF LOITERING BUT SUFFICIENT TO SUSTAIN CONVICTION OF PICKETING, THE GENERAL JUDGMENT RENDERED BY THE COURT IS PROPERLY REFERABLE TO THE COUNT SUSTAINED BY THE EVIDENCE.

Assuming for the purpose of argument that the State did not meet the burden of proof with respect to the offense of loitering, it is submitted that there is adequate evidence to support a finding that this petitioner was picketing the works or place of business of the Brown Wood Preserving Company for the purpose of hindering, delaying or interfer-

ing with or injuring the lawful business or enterprise of such company as was charged in the third count of the complaint filed in the Circuit Court of Tuscaloosa County (R. 5). It is to be noted that the judgment entry of the Circuit Court of Tuscaloosa County, sitting without a jury, is general in form, in that, it is recited that the defendant, Byron Thornhill, is "guilty of loitering and picketing as charged in the complaint." (R. 9)

The rule has many times been stated by the appellate courts of Alabama that where there is a general judgment of guilt under an indictment or complaint charging several offenses, if the evidence is sufficient to sustain a convicton under one count of the indictment or complaint but not under another count, the judgment is referable to the count sustained by the evidence. *Watson v. State*, 20 Ala. App. 372, 374, 102 So. 492, cert. den. 212 Ala. 330, 102 So. 494 (where the defendants were jointly indicted for burglary and grand larceny, the indictment containing two counts, and a general verdict of guilty was rendered against the defendants after proof of grand larceny only. It is to be particularly noted that the judgment entry recites, after verdict of guilty as charged in the indictment is shown, that "it is, therefore, ordered and adjudged by the court that the defendant, Frank Watson, is guilty as charged in the indictment, of burglary," etc. and that the Court of Appeals treated the words "of burglary" in the judgment entry as "mere surplusage." The Supreme Court evidently accepted this treat-

ment as correct for, as noted, certiorari was denied without further opinion, 212 Ala. 330).

Corrunker v. State, 19 Ala. App. 500, 98 So. 363 (where defendant was tried upon an affidavit containing two counts, one charging the sale of prohibited liquors and the second, possession of prohibited liquors, and the evidence justifying conviction under one of the counts only, the Court of Appeals sustaining the judgment held that the general verdict of guilty was referrable to that count.)

See also Williams v. State, 27 Ala. App. 227, 169 So. 337;

Osborne v. State, 25 Ala. App. 276, 144 So. 599;

Redwine v. State, 28 Ala. App. 95, 179 So. 390;

Myrick v. State, 20 Ala. App. 18, 100 So. 455;

Cleveland v. State, 20 Ala. App. 426, 103 So. 707, cert. den. 212 Ala. 635, 103 So. 711;

Haney v. State, 19 Ala. App. 79, 95 So. 57

It is submitted therefore, that since the evidence introduced by the State permitted no other conclusion but that petitioner was picketing the works or place of business of the Brown Wood Preserving Company and since it appears, in view of

the rule that the law presumes that every person intends to do what he does (authorities supra) that this petitioner intended to hinder, delay, interfere with or injure the lawful business or enterprise of the Brown Wood Preserving Company, this Court should conclude that the evidence was sufficient to justify a conviction of picketing and that, even assuming for the purpose of argument that the State did not make out its case with respect to loitering, the general judgment entry of the Court is properly referable to count three of the complaint charging picketing and supported by the evidence.

III.

VALIDITY OF JUDGMENT ENTRY.

While what has been said hereinabove is upon the assumption that the judgment entry is in all respects valid, we feel that in as much as the questions put by members of the Court during the course of the oral argument directed attention to the judgment entry, and since it does not appear that either the Court of Appeals or the Supreme Court considered in their opinions the sufficiency of the judgment entry, we should call the Court's attention to the case of *Burt v. State*, 159 Ala. 134, 48 So. 851, which deals with a judgment entry in which the defendant was convicted of two different offenses based upon one single act or one course of conduct, one transaction. In that case, the Supreme Court of Alabama held that there can be but one conviction of the offender for a single act, though that act

should be in violation of one or more penal statutes. While the Burt case may not here be of determining importance, in view of the questions put by members of this Court we feel it to be our duty to bring to the Court's attention this ruling of the Alabama court for the reason that the judgment entry in the instant case seems to convict the defendant of two offenses based upon a single act, in that, the defendant has been found guilty of loitering and picketing and a sentence has been imposed upon him requiring that he pay a fine of $100 and costs (R. 8).

IV.

CASES CITED BY PETITIONER.

Handbill Cases.

During the course of argument, counsel for petitioner strongly contended that the so-called "handbill cases" (*Schneider v. State*, No. 11; *Young v. People of California*, No. 13; *Snyder v. City of Milwaukee*, No. 18 and *Nichols v. Commonwealth of Massachusetts*, No. 29) are persuasive authority with respect to the position taken by petitioner that a sovereign state is without authority to regulate or prohibit picketing or loitering.

In each of the handbill cases, this court reversed the holding of the state court on the ground that the ordinance in question amounted to or could be applied as a prohibition of the distribution of handbills on the streets.

The Los Angeles code provision in question provided, Sec. 28.01:

> "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any streetcar, or throw, place or attach any handbill into or upon any automobile or other vehicle."

Appellant was convicted of violating this ordinance by distributing handbills, of which he still had more than 300 in his possession, to pedestrians on a public sidewalk.

The ordinance in question in the city of Milwaukee provided:

> "It is hereby made unlawful for any person * * * to circulate or distribute any circulars, handbills, cards, posters, dodgers, or other printed or advertising matter * * * in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the city of Milwaukee * * *."

The petitioner in this case along with sixteen others, was convicted of violating this ordinance by acting as a picket in front of a meat market where a strike was in progress and of passing out handbills to pedestrians concerning the same. Many of the bills were in fact thrown on the street by the persons receiving them.

The Worcester, Massachusetts ordinance provided:

> "No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description."

The pamphlets distributed on the street in this case announced a meeting in connection with the administration of state unemployment insurance.

The ordinances in the Los Angeles, Milwaukee and Worcester cases this Court held to be general prohibitions and consequently void. It had no difficulty in arriving at that conclusion. The court discussed certain restrictions that might be imposed on the freedom of the press. It reiterated the right referred to in the Griffin case to suppress obscene and immoral literature. It further pointed out that a municipality may enact regulations in the interest of public safety, health, welfare or convenience, but in doing so it may not abridge the constitutional right of free speech and freedom of the press. It stated a person "could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a munici-

pality of the power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct does not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, to print or distribute information or opinion."

The Town of Irvington, New Jersey, ordinance was somewhat broader in its scope than that involved in the other three cases. It provided:

> "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matters, or call from house to house in the Town of Irvington without having first reported to and received a written permit from the Chief of Police or the officer in charge of police headquarters."

The applicant for a permit was required to supply information concerning himself and the permit was then granted in the discretion of the police officer to proper persons. The petitioner in this case was distributing circulars of a religious sect and accepting contributions to make it possible that additional booklets could be placed in the hands of others. The activity carried on in this case differed from that in the other cases only by the distribution being on private premises while in the other cases the distribution complained of was on a public street and resulted in littering the same. The court points out here that if there is not an absolute prohibition of the distribution of published material it

at least results in censorship and prelicensing by the police.

In our judgment, the pivotal point of these cases is that the littering of the street itself was not thought by the court to be sufficient ground for such drastic measures prohibiting or interfering with the distribution of handbills. The court holds the prevention of the littering of streets, the single public benefit to be obtained to be of minor importance as compared to the matter of preserving the freedom of the press and freedom of speech. Mr. Justice Roberts, speaking for the court says:

> "Any burden imposed upon the city authorities in clearing and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."

It is submitted, however, that the end involved in this case, the Thornhill case, is the protection of the property of the community from ultimate destruction and that Section 3448 is a direct enactment to this end. Moreover, the statute is not directly aimed at a suppression of the right of freedom of speech or freedom of press but is directed to other activities as well. Indeed, it may be likened to the ordinance of the City of Boston, Massachusetts, considered in *Davis v. Massachusetts*, 167 U. S. 43, of which this Court spoke in *Hague v. C. I. O.*, 307 U. S. 496, stating that the court would recognize the difference between an ordinance directed "solely at

the right of speech and assemblage" and one "addressed as well to other activities", concluding the former to be unlawful and the latter justifiable.

Senn v. Tile Layers Union

301 U. S. 468.

During the course of the argument, petitioner read the following from the case of Senn v. Tile Layers Union:

> "Members of the Union might without special statutory authorization by a state make known the facts of a labor dispute for freedom of speech is guaranteed by the federal constitution."

From this quotation counsel drew the conclusion that the Court had determined that the right to picket was guaranteed by the Fourteenth Amendment.

Counsel failed, however, to read the sentence immediately following the foregoing quotation, in which the Court said:

> "The state may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets."

It is respectfully submitted that Section 3448 merely regulates the methods and means of pub-

licity, in that, it simply provides that a person may not loiter or go near to the premises or place of business of another without just cause and legal excuse for the purposes set forth in the statute and it further provides that a person may not picket the works or place of business of another for the purpose of hindering, delaying, interfering with or injuring the lawful business of such person. It is respectfully submitted that this is a justifiable exercise of the police power of the Legislature of the State of Alabama directed to a justifiable end.

CONCLUSION.

It is, therefore, respectfully submitted that it having been shown that this petitioner was properly convicted of the offenses charged under Section 3448 of the Code of Alabama, 1923, the sole question presented for decision is as to the constitutionality of that section. In this regard, may we again respectfully insist that the Legislature in enacting Section 3448 was seeking to give effect to the pronouncement of the Constitutional Convention of Alabama of 1901, as expressed in Section 35 of the Constitution of Alabama of 1901, that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, by restricting the places at which loitering or picketing could be carried on and the purposes for which loitering or picketing could be conducted. It is respectfully insisted that in so regulating loitering and picketing the Legislature of Alabama offended no constitutional provision, for

again we say that neither counsel for petitioner nor the writers of this brief have succeeded in finding a single judicial statement that the right to loiter or the right to picket is guaranteed by either the Fourteenth Amendment of the Constitution of the United States or of any other phase of the Constitution of the United States.

Respectfully submitted,

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For the State of Alabama.

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SUPREME COURT OF THE UNITED STATES.

No. 514.—October Term, 1939.

Byron Thornhill, Petitioner,
vs.
The State of Alabama.

On Writ of Certiorari to the Court of Appeals of the State of Alabama.

[April 22, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, Byron Thornhill, was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of Section 3448 of the State Code of 1923.[1] The Code Section reads as follows:

"Section 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The complaint against petitioner, which is set out in the margin,[2] is phrased substantially in the very words of the statute. The first and second counts charge that petitioner, without just cause or legal excuse, did "go near to or loiter about the premises" of the Brown

[1] Petitioner was first charged and convicted in the Inferior Court of Tuscaloosa County and sentenced to imprisonment for fifty-nine days in default of payment of a fine of one hundred dollars and costs. Upon appeal to the Circuit Court, another complaint was filed and a trial *de novo* was had pursuant to the local practice. The Circuit Court sentenced petitioner, upon his conviction, to imprisonment for seventy-three days in default of payment of a fine of one hundred dollars and costs.

[2] "1. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did without just cause or legal excuse therefor, go near to or loiter about the premises or place of business of another person, firm, corporation or association of people, to-wit: the Brown Wood Preserving Company, Inc., a corporation, engaged in a lawful business, for the purpose or with the intent of influencing

Wood Preserving Company with the intent or purpose of influencing others to adopt one of enumerated courses of conduct. In the third count, the charge is that petitioner "did picket" the works of the Company "for the purpose of hindering, delaying or interfering with or injuring [its] lawful business". Petitioner demurred to the complaint on the grounds, among others, that Section 3448 was repugnant to the Constitution of the United States in that it deprived him of "the right of peaceful assemblage", "the right of freedom of speech", and "the right to petition for redress". The demurrer, so far as the record shows, was not ruled upon, and petitioner pleaded not guilty. The Circuit Court then proceeded to try the case without a jury, one not being asked for or demanded. At the close of the case for the State, petitioner moved to exclude all the testimony taken at the trial on the ground that Section 3448 was violative of the Constitution of the United States.[3] The Circuit Court overruled the motion, found petitioner "guilty of Loitering and Picketing as charged in the complaint", and entered judgment accordingly. The judgment was affirmed by the Court of Appeals, which considered the constitutional question and sustained the section on the authority of two previous decisions in the Alabama courts.[4] *O'Rourke* v. *City of Birmingham*, 27 Ala. App. 133,

or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by the said Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation.

"2. [The second count is identical with the first, except that the last clause, charging a purpose to hinder, delay or interfere, etc., with the lawful business of the Preserving Company, is omitted.]

"3. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did picket the works or place of business of another person, firm, corporation or association of people, to-wit, the Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying, or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation."

[3] The petitioner also moved to exclude the testimony on the ground that it was insufficient to sustain a conviction. Upon being asked by the Court whether he insisted on this ground, however, counsel for petitioner stated that the only question he wanted to raise was the constitutionality of the statute.

[4] The Court of Appeals stated: "It seems clear enough that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he was being prosecuted, within the purview of the prohibition implied in said Statute.

"So, as conceded by able counsel here representing appellant, 'the only question involved in this appeal is the constitutionality *vel non* of Section 3448 of the Code of Alabama of 1923.'"

168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209; *Hardie-Tynes Mfg. Co.* v. *Cruise*, 189 Ala. 66, 66 So. 657. A petition for certiorari was denied by the Supreme Court of the State. The case is here on certiorari granted because of the importance of the questions presented. December 11, 1939.

The proofs consist of the testimony of two witnesses for the prosecution.[5] It appears that petitioner on the morning of his arrest was seen "in company with six or eight other men" "on the picket line" at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, aparently affiliated with The American Federation of Labor, which had as members all but four of the approximately one hundred employees of the plant. Since that time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property and get their mail from a post office on Company property and that the Union holds its meetings on Company property. No demand was ever made upon the men not to come on the property. There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who te fied: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill aproached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing

[5] No evidence was offered on behalf of petitioner.

threatening in the manner of either man.'"[6] For engaging in some or all of these activities, petitioner was arrested, charged, and convicted as described.

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.[7]

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States* v. *Carolene Products*, 304 U. S. 144, 152-153n. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations. *Schneider* v. *State*, 308 U. S. 147, 161, 162.

Second. The section in question must be judged upon its face.

The finding against petitioner was a general one. It did not

[6] Simpson and Walden are not in entire accord with respect to the number of persons present during the conversation between Simpson and petitioner. A possible inference from Simpson's testimony, considered by itself, is that petitioner was in the company of six or eight others when the conversation took place. This difference is not material in our view of the case.

[7] Schneider v. State, 308 U. S. 147, 160; Lovell v. Griffin, 303 U. S. 444, 450; De Jonge v. Oregon, 299 U. S. 353; Grosjean v. American Press Co., 297 U. S. 233, 244; Near v. Minnesota, 283 U. S. 697, 707; Stromberg v. California, 283 U. S. 359, 368; Gitlow v. New York, 268 U. S. 652, 666. See Palko v. Connecticut, 302 U. S. 319, 326-327.

specify the testimony upon which it rested.[8] The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions.[9] In these circumstance, there is no occasion to go behind the face of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges. "Conviction upon a charge not made would be a sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362; *Stromberg* v. *California*, 283 U. S. 359, 367-368. The State urges that petitioner may not complain of the deprivation of any rights but his own. It would not follow that on this record petitioner could not complain of the sweeping regulations here challenged.

There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U. S. 147, 162-165; *Hague* v. *C.I.O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations.[10] Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713. One who might have had a

merely

[8] The trial court merely found petitioner "guilty of Loitering and Picketing as charged in the complaint."

[9] The Court of Appeals determined merely that the evidence was sufficient to support the conviction under Section 3448. See note 4, *supra*, p. 2. It then sustained the judgment in reliance upon O'Rourke v. City of Birmingham, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209; and Hardie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 So. 657.

[10] Compare Electric Bond Co. v. Comm'n, 303 U. S. 419; Smith v. Cahoon, 283 U. S. 553, 562; Gundling v. Chicago, 177 U. S. 183, 186; Lehon v. Atlanta, 242 U. S. 53, 55, 56; Hall v. Geiger-Jones Co., 242 U. S. 539, 553, 554.

license ~~merely~~ for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C.I.O.*, 307 U. S. 496. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that, in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of a such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.[11] It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship.[12] An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368; *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451.

Third. Section 3448 has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard

[11] The record in the case at bar permits the inference that, while picketing had been carried on for several weeks, with six to eight men at each of two picket posts, Section 3448 was not enforced against anyone other than petitioner, the Union President, and then only after his conversation with Simpson who thereupon returned home rather than report for work.

[12] A distinguished commentator has observed that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. See Madison's Report on the Virginia Resolutions, 4 Ell. Deb., 2d ed., 1836, p. 569; Address on the Conduct of the Maryland Convention of 1788, 2 id., p. 552.

on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor;[13] the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. *O'Rourke* v. *City of Birmingham*, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209.[14] The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

The numerous forms of conduct proscribed by Section 3448 are subsumed under two offenses: the first embraces the activities of all who "without just cause or legal excuse" "go near to or loiter about the premises" of any person engaged in a lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who "picket" the place of business of any such person "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another."[15] It is apparent that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. The phrase "without just cause or legal excuse" does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453-455.[16] The courses of action, listed

[13] The employer in fact had locked out its union stagehands and was working others not regularly employed as stagehands in admitted violation of the National Industrial Recovery Act.

[14] Accused there asserted that the application of Section 3448 to the particular facts of his case deprived him of rights guaranteed to him by the Fourteenth Amendment. The Court of Appeals passed upon this constitutional question and decided it adversely to the contentions of accused.

[15] There is a proviso that "nothing herein shall prevent any person from soliciting trade or business for a competitive business."

[16] So far as the phrase may have been given meaning by the State courts it apparently grants authority to the court and the jury to consider defensive matter brought forward by the accused, depending for its sufficiency not upon rules of general application but upon the peculiar facts of each case. See Owens v. State, 74 Ala. 401; Bailey v. State, 161 Ala. 75, 49 So. 886; Folmar v. State, 19 Ala. App. 435, 97 So. 768. Compare O'Rourke v. City of Birmingham, 27 Ala. App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209.

under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute.[17] The vague contours of the term "picket" are nowhere delineated.[18] Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute.

Fourth. We think that Section 3448 is invalid on its face.

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and

[17] The only direct evidence in the case at bar to show that the activity of petitioner was accompanied by the necessary intent or purpose is the fact that one other employee, after talking with petitioner, refrained from reporting for work as planned. There is evidence here that the other employee was acquainted with the facts prior to his conversation with petitioner. The State concedes, however, that under Section 3448 everyone must be deemed to intend the natural and probable consequences of his acts. See Jacobs *v.* State, 17 Ala. App. 396, 85 So. 837; Reid *v.* State, 18 Ala. App. 371, 92 So. 513; Weeks *v.* State, 24 Ala. App. 198, 134 So. 870, cert. denied, 222 Ala. 442, 132 So. 871; Worrell *v.* State, 24 Ala. App. 313, 136 So. 737, cert. denied, 223 Ala. 425, 136 So. 738.

[18] See Hellerstein, *Picketing Legislation and the Courts* (1931), 10 No. Car. L. Rev. 158, 186n.: "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e. g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a "scab", (iii) a trade or employees' boycott, i. e., preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.

"The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both."

truthfully all matters of public concern without previous restraint or fear of subsequent punishment.[19] The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times.[20] The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C.I.O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147, 155, 162-63. See *Senn* v. *Tile Layers Union*, 301 U. S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argu-

[19] Stromberg v. California, 283 U. S. 359; Near v. Minnesota, 283 U. S. 697; Lovell v. Griffin, 303 U. S. 444; Hague v. CIO, 307 U. S. 496; Schneider v. State, 308 U. S. 147.

[20] See Duniway, *The Development of Freedom of the Press in Massachusetts*, p. 123 *et seq.*; Tyler, *Literary History of the American Revolution*, *passim*; 2 Bancroft, *History of the United States*, p. 261; Schofield, *Freedom of the Press in the United States* (1914), 9 Proc. Am. Sociol. Soc. 67, 76, 80.

ment that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.[21] This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U. S. at 488. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of

public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.[22] We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern.

It is not enough to say that Section 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute "[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 161; *Hague* v. *C.I.O.*, 307 U. S.

21 See, e. g., Senn v. Tile Layers Union, 301 U. S. 468; Ethyl Gasoline Corp. v. United States, No. 536, this Term; National Labor Relations Board v. Newport News Co., No. 20, this Term; West Coast Hotel Co. v. Parrish, 300 U. S. 379; Nebbia v. New York, 291 U. S. 502; Dorchy v. Kansas, 272 U. S. 306; Eastern States Retail Lumber Dealers Association v. United States, 234 U. S. 600; Aikens v. Wisconsin, 195 U. S. 194; Holden v. Hardy, 169 U. S. 366.

22 See Mr. Justice Holmes in 249 U. S. at 52; 250 U. S. at 630.

496, 515-16.[23] The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448.

Reversed.

Mr. Justice McReynolds is of opinion that the judgment below should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[23] The fact that the activities for which petitioner was arrested and convicted took place on the private property of the Preserving Company is without significance. Petitioner and the other employees were never treated as trespassers, assuming that they could be where the Company owns such a substantial part of the town. See p. 3, *supra*. And Section 3448, in any event, must be tested upon its face.